Petition

81-1636

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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, PHILIP M. ECKARD, RONALD B. ELLIOT, DAVID A. LIST, and HERMOGENES MANUEL.,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Florida

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FLORIDA SUPREME COURT CORRECTLY CONSTRUED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HOLDING THAT THE "OPEN FIELDS DOCTRINE" OF HESTER v. UNITED STATES, 265 U.S. 57 (1924) WAS INAPPLICABLE TO THE INSTANT CASE, WHERE CONTRABAND WAS SEIZED FROM AN 1,800 ACRE OPEN FIELD, JUST BECAUSE THE FIELD WAS BARBED WIRE FENCED, LOCKED, AND POSTED?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Florida petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Florida.

OPINIONS BELOW

The decision of the Supreme Court of the State of Florida was filed on October 15, 1981, rehearing denied on January 8, 1982. It is not yet reported, but is reproduced in the instant Appendix, pages 1-28.

The prior decision of the District Court of Appeal of the State of Florida, Fourth District, was filed on January 16, 1980, rehearing denied on March 19, 1980. State of Florida v. Brady, 379 So.2d 1294 (Fla. 4DCA

(1980).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the Florida Supreme Court was filed on October 15, 1981. Petitioner's timely Motion for Rehearing was denied by order of that court on January 8, 1982. This petition is timely filed within 60 days of that date, pursuant to Rule 20.1, Rules of the United States Supreme Court. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

> shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondents Brady, Eckard, and Elliot were arrested and charged with delivery of marijuana in excess of 100 pounds, possession of marijuana in excess of 100 pounds, conspiracy to possess marijuana in excess of 100 pounds, and importation of marijuana. Respondents List and Manuel were charged with attempted possession of marijuana in excess of 100 pounds.

The arrests and seizure of the contraband took place as the contraband was being off-loaded from a small aircraft which had just landed upon a

private airstrip which was situated in the middle of an 1,800 acre field belonging to Respondent Brady. The field was barbed wire fenced, locked, and posted.

Law enforcement officers had received information that some planes carrying contraband might land on this airstrip and, consequently, set up surveillance teams around the field. No planes landed the first night and the watch was abandoned. Surveillance began again the next evening and the plane in question did, in fact, land.

There were three surveillance teams. One team was outside the perimeters of the fence altogether. A second team had climbed over the barbed wire fence. A third team set up surveillance within

the perimeters of the fence by cutting the chain lock to one of the gates with bolt cutters and swinging the gate open. While Respondent Brady produced pictures at a subsequent suppression hearing indicating that a gate had been rammed, said pictures were not taken until as late as two or three days after the incident in question. Further, while concededly there were "no trespassing" signs, the officers who were asked the question testified at the suppression hearing that they were unable to see such signs.

At the pretrial suppression hearing before the state trial court, Respondents argued that a search warrant was necessary prior to the officers' entry into the field, while Petitioner argued

that there was insufficient probable cause to justify a search warrant and none was necessary anyway under the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924). See transcript of hearing on motion to suppress held on September 26, 1978, pages 78-113. The state trial court accepted Respondents' position, and granted the motion to suppress evidence. See transcript of hearing on motion to suppress held on September 26, 1978, pages 113-122.

Petitioner filed a timely direct appeal to the state appellate court in which it briefed the same issue presented in the trial court. Petitioner asserted that the instant case was nothing more than a trespass

upon open fields, justifiable under the "open fields" doctrine of Hester, supra. It mattered not that these open fields may or may not have been fenced. The law of the land in regard to reasonable expectations of privacy does not extend to open fields, regardless of the fact that they may be fenced. It does, however, extend to curtilage surrounding a dwelling, or buildings, or fenced areas around buildings where the fence is not separated from the building by great expanses of open land. Petitioner concluded that there could be no reasonable expectation of privacy in an open field, for to conclude to the contrary would extend the protection offered by the Fourth Amendment to an absurdity by allowing open fields to

become a refuge for criminals or criminal activity. Petitioner additionally argued that there was insufficient probable cause to obtain a search warrant to search for contraband which the officers merely hoped would land at the field. The officers could not have known with any certitude exactly where, when, and how the contraband would arrive. Thus, any variation in the plans from the scanty information which the officers had knowledge of, would have defeated the search warrant. The District Court of Appeal of the State of Florida, Fourth District, nonetheless ruled against Petitioner's arguments, holding that Respondents' manifestations of a right of privacy were reasonable. State v.

Brady, 379 So.2d 1294 (Fla. 4DCA 1980); Appendix, pages 29-45.

Petitioner timely sought and obtained discretionary review in the Florida Supreme Court, before which the issues were raised in essentially the same manner. Petitioner relied upon the "open fields" doctrine of Hester, supra. Petitioner argued that one has no legitimate and reasonable expectation of privacy in the open fields and, therefore, no warrant is required even if, arguendo, probable cause existed and there was sufficient time to obtain the same. Petitioner argued that while Respondents may have manifested a "subjective" expectation of privacy, it could not be considered a "reasonable" expectation of privacy inasmuch as the

illegal activity was being conducted in the open air in the middle of 1,800 acres of open field. Petitioner concluded that the very concept of an open field is inconsistent with a reasonable, justifiable, or legitimate expectation of privacy, and that an open field should not be allowed to be a refuge for criminals by the mere act of placing a fence around those fields. Petitioner also argued in its reply brief that there was insufficient probable cause to obtain a warrant to search the field in question for marijuana which they merely hoped would later arrive at the field by plane. The Florida Supreme Court ruled against Petitioner's arguments, holding that Respondents manifested an expectation

of privacy and that this expectation of privacy was a reasonable one under the facts of the instant case. Appendix, pages 1-27. Every case cited in the instant Petition for Writ of Certiorari was cited, among others, to the Florida Supreme Court prior to the rendition of this opinion.

The instant Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

Petitioner recognizes that the criteria stated in United States Supreme Court Rule 17 neither control nor fully measure this Honorable Court's discretion. However, not only are the criteria fully met, but there are also substantial policy reasons supporting this Court's acceptance of

certiorari jurisdiction.

The Florida Supreme Court has construed the Fourth Amendment, i.e., the applicability of the "open fields" doctrine, in a manner which conflicts with the construction given that doctrine by various other state courts of last resort and federal courts of appeals. Essentially, the Florida Supreme Court held that the 1,800 acre open field in question lost its status as such by the fact that Respondents manifested an expectation of privacy by barbed wire fencing, locking, and posting the field. The Florida Supreme Court concluded that this manifestation of privacy was one which society should tolerate as reasonable. Consequently, the field was not a

"truly open field." This conclusion was reached despite the fact that there was nothing more than a private airstrip on this nearly three-square mile expanse of land, and a trailer (which was neither searched, approached, or related to the activities in question ---said trailer being situated nearly one-half mile from the airstrip).

To be sure, the Florida Supreme Court was troubled by the fact that law enforcement officers cut the fence. The opinion reflects the great lengths to which the court went in attempting to distinguish just a few of the myriad of state and federal cases cited to them so that they could reject the construction of the Fourth Amendment which has been adopted by so many courts on so many other

occasions. Of course, such activity on the part of law enforcement officers should not be approved, but the disapproval of the cutting of the fence and sanctions for it must come from other aspects of the law than the exclusionary rule. See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), for a discussion of other remedies. Regardless of how the fence was crossed, the "open fields" doctrine justified the officers' entry. The Florida Supreme Court failed to even mention, much less disapprove, cases within their own state. See, for example, DeMontmorency v. State, 401 So.2d 858 (Fla. 1DCA 1981), which upheld, under the "open fields" doctrine, an entry

by officers into a fenced, locked field whereupon marijuana was discovered.

The Florida Supreme Court's opinion further fails to consider, and conflicts in material respects with, the opinion rendered by the high court of Georgia in Giddens v. State, 274 S.E.2d 595 (Ga. 1980), cert. denied, Giddens v. Georgia, ___ U.S. ___ (March 23, 1981), 28 CR.L. 4244 (1981). In that case, law enforcement officers crossed over barbed wire fencing (which was locked) and went into a field whereupon marijuana was discovered. The high court of Georgia concluded that this was, nonetheless, an open field to which Fourth Amendment protections did not extend, under Hester, supra.

The material facts were the same as those in the instant case. Officers crossed a locked wire fence onto a field whereupon marijuana was discovered. The Florida case under review and the Giddens case from Georgia thus present divergent constructions of the "open fields" doctrine.

The Florida Supreme Court's opinion also construes the "open fields" doctrine in a manner which conflicts with that of the high court of Wisconsin. In Conrad v. State, 218 N.W.2d 252 (Wisc. 1974), officers trespassed upon 40 acres of private land on which a house was set. Several holes two or three feet deep were dug by a bulldozer under the officers' direction in the open fields portion of this land. Finally, after

bulldozing a pile of rocks and digging underneath, the body of a murder victim was found. The Wisconsin court recognized that the defendant therein manifested an expectation of privacy, but concluded that it was not one which society was prepared to accept. This conclusion was premised upon the "open fields" doctrine, with the Wisconsin court reasoning:

> "The area is simply not within the protection of the Fourth Amendment. If the field where the body was found does not have constitutional protection, the fact that the sheriff, rather than observing the evidence that might have been in plain view, dug into the earth to find the body and committed a trespass in so doing does not confer protection." Id. at 257.

The high courts of Florida and Wisconsin thus present divergent

views of the "open fields" doctrine on materially identical facts. Both cases recognized what might be characterized as an outrageous trespass upon open fields, but where the high court of Florida indicated that such trespass alone was sufficient to defeat the applicability of the "open fields" doctrine, the high court of Wisconsin indicated completely to the contrary.

Finally, the Florida Supreme Court's construction of the Fourth Amendment in this regard is inconsistent with the construction given the doctrine in question by several federal courts of appeals. In United States v. Basile, 569 F.2d 1053 (9th Cir. 1978), the Ninth Circuit concluded that the

"open fields" doctrine defeated the defendant's claim of a violation of the Fourth Amendment when officers crossed a fence onto private property and locked into an apparently abandoned truck which was probably 100 yards from the defendant's house. In United States v. Brown, 473 F.2d 952 (5th Cir. 1973), the "open fields" doctrine defeated the defendant's claim of a violation of the Fourth Amendment when officers dug up the ground at a point adjacent to a chicken coop and found evidence of a robbery. In United States v. Cain, 454 F.2d 1285 (7th Cir. 1972), the "open fields" doctrine defeated the claim of a violation of the Fourth Amendment when agents trespassed on the private portion of 300 acres of

farmland and found evidence of "baiting" for the purpose of taking wild fowl in violation of federal regulations. In United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976), officers crossed over a fence which surrounded 20 acres of land on which the defendant's residential and agricultural structures were located. Again, the Seventh Circuit entered into a thorough discourse of the open fields doctrine, noting that land is not taken out of the concept of being "open fields" merely because it is fenced. In Fullbright v. United States, 392 F.2d 432 (10th Cir. 1968), agents crossed what presumably was the boundary fence of the farm, then a field, and then another little fence to reach their position for observation.

Again, the Tenth Circuit stated that this was open fields, not protected by the Fourth Amendment. In each of the federal appellate decisions, the discussion of the legal principles surrounding the "open fields" doctrine is at odds with the discussion and ultimate conclusions reached by the Florida Supreme Court in the case herein under review.

The mere fact that the Florida Supreme Court's opinion renders a construction of the Fourth Amendment at odds with the other state and federal opinions cited above is not the only reason justifying this Court's acceptance of certiorari jurisdiction. As this Court has recognized in prior opinions, the understandable concern for individual rights has evolved into

a complete disregard for public safety. Members of this Court have recognized that the public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit, and that much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement. See, Justice Powell's concurring opinion in United States v. Mendenhall, 446 U.S. 544 (1980). The open fields doctrine is of long standing and continued vitality. It cannot be so restricted as to make it a refuge for criminals, for to do so would extend the protection afforded by the Constitution to an absurdity. The

very concept of an open field is inconsistent with a reasonable, justifiable, or legitimate expectation of privacy, regardless of how one may manifest that expectation. Such a doctrine as that which would extend search and seizure protections to persons situated in the same posture as Respondents herein would be giving blanket authority for any person to buy or lease a great expanse of open land, surround it with a fence, and conduct any illegal operation out in the open air that one so chooses. The Constitution precludes only unreasonable searches and seizures. There are circumstances in which the need for effective law enforcement must be balanced against the right of privacy, and as the facts of a case approach

the periphery of privacy, the requirements demanded of an officer must correspondingly be less exacting. The balance must be kept true for both the decent folks and for those who defy the law. Open air drug smuggling activities, whether or not they be within a fenced area, and whether or not they be in a secluded area, cannot be given constitutional protection. One must remember that the exclusionary rule was meant to deter unconscionable police activity. It was not meant to be a technical escape hatch for criminals. The actions of the officers herein do not transcend that level of intrusion which society is not prepared to tolerate. However, by contrast, society is <u>not</u> prepared to tolerate such unmitigated and unpreventable

illegal activity conducted in the open air as that done by Respondents herein. The problem is not unique to Florida. The drug problem eats at the very fabric of our society. With the enormous profits gained from drug smuggling, it is nothing less than commonplace for organized drug smuggling rings to buy up massive acreages of open field, place an airstrip thereon, and smuggle in their wares to be distributed around the country. The mere placing of a locked and posted fence around such massive acreages should not be allowed to bring this activity within the protection of the Fourth Amendment. The second prong of the test enunciated in Katz v. United States, 389 U.S. 347 (1967),

i.e., the expectation must be one that society is prepared to recognize as reasonable, must be flexible enough to reflect evolving societal concerns. With reference to the instant case, the factual pattern of which is prevalent throughout the country, the balance should be struck in favor of the decent folk.

CONCLUSION

Petitioner has sought to present to this Honorable Court a substantial basis upon which to conclude that this area of the law is deserving of being addressed by the United States Supreme Court. There is a solid jurisdictional basis predicated upon conflicts between the opinion under review and the opinions rendered by other state

courts of last resort and federal courts of appeals. Further, there are substantial policy reasons, including the fact that the instant factual pattern (with reference to the drug problem) has substantial and serious nationwide ramifications. This case presents an important question of federal law which should be settled by this Court. There are no collateral issues contained in the instant factual pattern which could have the effect of diverting this Court's attention away from the issue herein presented. On the basis of the above, Petitioner submits that the instant Petition for Writ of Certiorari should be granted.

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SUPREME COURT OF FLORIDA

No. 59,054

STATE OF FLORIDA, Petitioner,

vs.

FRANK J. BRADY, et al., Respondents.

[October 15, 1981]

ADKINS, J.

By petition for certiorari, we have for review a decision of the District Court of Appeal, Fourth District (State v. Brady, 379 So.2d 1294 (Fla. 4th DCA 1980)), which expressly and directly conflicts with a prior decision of the District Court of Appeal, First District (Aylin v. State, 362 So.2d 435 (Fla. 1st DCA 1978)). We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

Respondents, Frank J. Brady, Philip M. Eckard, and Ronald B. Elliot,

were arrested and charged with delivery of marijuana in excess of 100 pounds, possession of marijuana in excess of 100 pounds, conspiracy to possess marijuana in excess of 100 pounds, and importation of marijuana. Respondents, David A. List and Hermogenes Manuel were charged with attempted possession of marijuana in excess of 100 pounds.

On the day prior to the arrests, the Martin County Sheriff's Office was given information indicating that one or two airplanes carrying contraband might land at respondent Brady's ranch. The information, relayed to the sheriff's department at approximately 2 p.m. that day, included the call numbers of the two aircraft. That evening, officers took up surveillance of the Brady ranch from the adjoining

property, but the planes never arrived and eventually the watch was abandoned. The next day, again around 2 p.m., another tip was received, again indicating that a plane would land in the evening and so law enforcement personnel staked out the property once more. In order to position surveillance groups around the ranch's airfield, deputies were forced to cross a dike, ram through one gate and cut the chain lock on another, cut or cross posted fences, and proceed several hundred yards to their hiding places. When the plane finally landed, the officers had to proceed the remaining few hundred yards to the aircraft in order to definitely ascertain what was going on and then make the arrests and seize the marijuana being transferred.

Asserting that the search and seizure operation was improper because the authorities failed to first obtain a warrant, each respondent filed a motion to suppress the evidence taken. The trial court granted the motions, whereupon petitioner filed a notice of appeal of said order. Petitioner also filed a motion for extension of speedy trial pending appellate proceedings, which was granted.

Shortly after the preceding, respondents List and Manuel filed a motion for speedy trial discharge which the trial court granted. Petitioner appealed the order granting the discharge and said appeal was consolidated with that from the order suppressing the evidence seized. The District Court of Appeal, Fourth

District, affirmed the order granting the motion to suppress but reversed the order granting the motion for discharge. Petitioner then invoked the discretionary jurisdiction of this Court to review the district court's decision.

We first consider whether the trial court was correct in granting the motions to suppress. Petitioner contends that under the "open fields doctrine" of Hester v. United States, 265 U.S. 57 (1924), respondent's Fourth Amendment protections do not extend to activity conducted in "open fields", and therefore that the authorities need not have obtained a warrant in order to conduct a legal search.

In Hester, revenue agents observed from across a field an exchange of moonshine whiskey in front of the

defendant's residence. The defendant was arrested and convicted of concealing distilled spirits and on appeal contended that his rights under the Fourth and Fifth Amendments to the United States Constitution were violated by the trial court's refusal to exclude the revenue agents' testimony concerning what had occurred in the field. The United States Supreme Court, in affirming the conviction, ruled that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields." Id. at 59.

Petitioner argues that the open fields doctrine remains viable, and that there is no constitutionally protected reasonable expectation of

privacy in an open field. Although the Hester opinion has not been overruled, subsequent opinions indicate that the open fields doctrine cannot be used as carte blanche for a warrantless search simply because the location searched is not part of a dwelling or its adjacent curtilage. As the Court later observed in its opinion in Katz v. United States, 389 U.S. 347, 350-52 (1967):

> [T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area."
>
> * * *
>
> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

(citations omitted).

In his concurrence in Katz, Justice Harlan suggested the following two-part test for determining whether Fourth Amendment protections are warranted in a particular situation:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for the most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.

Id. at 361.

Under the reasoning of Katz, if the owner or occupier of a field seeks to keep it private and demonstrates an actual intention to do so, and his expectation is one that society is willing to recognize as reasonable, then Fourth Amendment protections extend to activities in that field.

In determining whether the "two-fold requirement" for Fourth Amendment protection is met here, we find helpful our opinion in Norman v. State, 379 So.2d 643 (Fla. 1980).

In Norman, a defendant convicted of possessing cannabis contended that evidence introduced at his trial was inadmissible because it had been discovered during an unauthorized search of his farm. The local sheriff,

on the basis of information received from a confidential informant, had gone to the defendant's farm, climbed a fence by a locked gate, and walked 250 yards to a barn in which he saw a substance which he identified as marijuana. He then ordered surveillance of the farm to determine who came and left. Several days later a deputy watching the place saw a man in a truck enter through the gate, drive to the barn and later, loaded with hay, drive back to the highway and into a field. The deputy detained the driver of the truck, the defendant, and took him to the sheriff's office where he was placed under arrest.

One of the points raised on appeal in Norman was whether the unauthorized search of the farm violated the

defendant's Fourth Amendment rights. The state contended that the sheriff's search of the farm was justified under the open fields doctrine. We disagreed, holding that the defendant's right against unreasonable searches and seizures was violated, and observing as follows:

> It seems incontestable that Mr. Norman exhibited a subjective expectation of privacy in the tobacco barn and its contents. He took overt steps to designate his farm and barn as a place not open to the public. The contraband, covered and wrapped in tobacco sheets, was in a closed structure. The farm itself was fenced, and the gate to the fence was kept locked.
>
> * * *
>
> The district court's reliance below on the "open fields" doctrine as enunciated in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), was misplaced. Hester stands for the un-

> remarkable proposition that the fourth amendment's protection of one's person, house, papers and effects does not extend to the open fields. Whatever the precise parameters of this long-standing but seldom-used doctrine, it certainly does not extend to a warrantless search of a closed structure on fenced property.

Id. at 647 (emphasis added). Our opinion in Norman made it clear that fences and locked gates are evidence of the owner's or possessor's expectation of privacy.

Obviously there are distinctions between the facts in Norman and those in the case sub judice. The former involved a warrantless search of a closed structure, the latter a search in a field. The contraband in Norman was inside a barn and covered with tobacco sheets, while that in the case at hand, at the time of seizure,

was being transferred from an airplane to several waiting vehicles. Such distinctions aside, however, the comments in Norman regarding evidence of an expectation of privacy still have relevance here. In Norman, we emphasized that "[t]he farm itself was fenced, and the gate to the fence was kept locked." Later, we reiterated that the barn was "on fenced property." The opinion clearly indicated that the enclosure and locking of the gate was significant and influenced our decision. The property in the case sub judice was not only fenced and locked, but was also surrounded by a dike and posted. Respondent unmistakably evidenced an expectation of privacy.

Having decided that respondent clearly demonstrated an expectation

of privacy, we now consider the second part of the Katz test: whether the expectation was one that society is prepared to recognize as reasonable. We find, under the facts of this case, that it was. Respondent, as noted before, fenced, locked, diked and posted his property. At the time of his arrest, he was at a spot remote from any entry point to the property. He was, in fact, so remotely located that the arresting authorities, after crossing the dike and fences, had to traverse several hundred yards of field in order to get close enough to see what was going on.

We think the facts are similar to those in United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), in which the government appealed an order grant-

ing motions to suppress marijuana seized in a warrantless search. The government argued that the owners of the shed which had been searched had no reasonable expectation of privacy because there were no fences surrounding any part of the property (which was quite remote), no "no trespassing" signs posted, nor any sign of a special effort having been made to conceal the marijuana from any "passerby." The Court disagreed with the government, observing:

> The government would have us ignore the character of the Moody property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush by putting up signs

> warning the government to keep away.

More to the point

> [T]he continuing concern with property rights is prompted by the realization that an individual often has a very reasonable expectation of privacy in his private property, and it is this expectation which the Fourth Amendment protects.

Id. at 870 (footnote and citation omitted).

We are aware that the facts in Holmes are distinguishable from those here insofar as the object of the search there was a shed while the arrest here was for activity carried on in a field. However, the observation in Holmes concerning agents crawling through underbrush is analogous to the situation here, where agents were forced to cross well-kept, posted fences and a dike, break a locked gate,

and then proceed several hundred yards to observe activity on private property. Respondent's expectation of privacy, in light of all the precautions he had taken, was certainly as reasonable as that of the defendant in Holmes.

Obviously, activity conducted in an open field does not, in most cases, warrant a significant expectation of privacy. Under the facts of this case, however, and in light of the size of the property and the precautions taken by respondent, we find that an expectation of privacy was reasonable.

Petitioner cites several cases involving open fields and warrantless searches in which courts held that there had been no violation of constitutional rights. The case sub

judice is, however, distinguishable from those cited when analyzed in the manner suggested by Justice Harlan in Katz.

In Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974), the United States Supreme Court cited Hester and made reference to the open fields doctrine in holding that a warrantless search was proper. The Court noted, however, that "[t]he field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded." Id. at 865. The easy accessibility of the property evidently played a role in the Court's decision. Respondent here, on the other hand, went to great lengths to exclude the

public from entering his land, distinguishing this situation from that in Western Alfalfa.

In United States v. Basile, 569 F.2d 1053 (9th Cir.), cert. denied, 436 U.S. 920 (1978), the Ninth Circuit Court of Appeals, citing Hester and Katz, held that evidence seized by authorities could not be suppressed since the truck in which it was found had been abandoned 100 yards from the defendant's home and thus there could be no reasonable expectation of privacy in the vehicle. Again, however, the facts in the case cited are distinguishable from those in the case at bar. The area in which the truck was abandoned was neither posted nor enclosed in any way which was likely to discourage entry therein. The only

obstacle met by the officials in reaching the spot was an old railroad right of way fence. The accessibility of the fields here and in Basile differs significantly.

In United States v. Brown, 473 F.2d 952 (5th Cir. 1973), the Fifth Circuit Court of Appeals held permissible the search of a chicken coop on an abandoned, unposted farm. In so holding, the Court made no reference to Katz, citing only to Hester and related cases. The facts in Brown, however, are at such a variance from those here that doubtless the search would also have been held proper even if the Court had used the analysis enunciated in Katz.

United States v. Cain, 454 F.2d 1285 (7th Cir. 1972), has little

relevance to the case sub judice because, like Brown, the facts are significantly different. The federal agents that conducted the search in Cain were properly on the property for a routine supervisory inspection. The area searched was regularly open to persons paying to hunt there, and there is no indication of an expectation of privacy on the part of the owners. Also as in Brown, the Court did not utilize the Katz test, but instead relied on the open fields doctrine in reaching its decision.

We will not go on, distinguishing this case from those in which warrantless searches of areas other than dwellings were held proper. Suffice it to say that it is distinguishable from those cited by petitioner either

because the cited case rigidly followed the open fields doctrine and ignored the test enunciated in Katz, or else presented a situation in which the owner had evidenced no expectation of privacy and/or had no reasonable such expectation.

The respondent here met both of the above requirements. He went to great lengths to demonstrate that outsiders were not welcome on his property - certainly one could not have made it to the spot from which the drug transfer was observed without realizing that he was not to be there. And in view of those efforts to keep others away, the size and seclusion of the property involved, and society's interest in protecting its citizens' privacy when in their homes and on their property,

we think that respondent's expectation of privacy was a reasonable one.

We are not here sounding the death knell for the open fields doctrine - only for the blind, indiscriminate application thereof. Activities carried on in a truly open field, or in any area which one knowingly exposes to the public, are not subject to Fourth Amendment protections. There can be no reasonable expectation of privacy in a field open, visible, and easily accessible to others. That, however, was not the case here.

In light thereof, we agree with that part of the decision of the district court holding that the warrantless search herein was improper and that the evidence seized as a result thereof should be suppressed. Petitioner's

second point on appeal is that section 893.13(1)(A)(2), Florida Statutes (1977), proscribes simple possession of over 100 pounds of cannabis as a felony of the second degree. The district court so found in its opinion in this cause, and, on the basis of our opinion in Parker v. State, No. 59,674 (Oct. 8, 1981), we also agree with that part of the decision.

Having considered each of the points raised by petitioner and finding that none have merit, the district court's decision is hereby approved.

It is so ordered.

SUNDBERG, C.J., BOYD, OVERTON and ALDERMAN, JJ., Concur
McDONALD, J., Dissents with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., dissenting.

I dissent from that portion of the opinion finding that the motion to suppress was properly granted.

This Court has adopted Justice Harlan's analysis of warrantless searches, as expressed in his concurrence to Katz v. United States, 389 U.S. 347 (1967):

> [T]he capacity to claim the protection of the fourth amendment depends upon whether a person has a "legitimate" expectation of privacy in the invaded area. That expectation will be recognized as legitimate if a person has exhibited an actual (subjective) expectation of privacy, and the expectation is one that society is prepared to recognize as reasonable.

Norman v. State, 379 So.2d 643, 647 (Fla. 1980). The majority has used the Katz-Norman analysis in the instant opinion. I disagree, however, with

the conclusion reached by the majority.

I do not doubt that respondents sought to fulfill the first part of the Katz-Norman test--having a subjective expectation of privacy. But, unlike the majority of this Court and the district court, I find that their expectation was not one society should recognize as reasonable. The property is an 1800-acre cattle ranch and contains an airstrip which respondents used to conduct illegal activities. The airstrip is some 2000 feet from the house trailer where one of the respondents resided. This property, although fenced, is essentially an open field. See Hester v. United States, 265 U.S. 57 (1924).

To require law enforcement officers to procure search warrants prior to

seizing contraband in such a situation is unreasonable, as opposed to the search and seizure being unreasonable. The fourth amendment does not apply to the circumstances of this case.

I concur with the majority's resolution of the second issue in this case.

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Fourth District - Case Nos. 78-2121 & 78-2771

Jim Smith, Attorney General and Robert L. Bogen, Assistant Attorney General, West Palm Beach, Florida,

for Petitioner

Robert W. Foley and Philip G. Butler, Jr. of Foley and Colton; and Janet W. Freeman, West Palm Beach, Florida, for Frank J. Brady; Steven M. Greenberg of Pertnoy and Greenberg, Miami, Florida, for Ronald B. Elliott and Philip M. Eckart; Joel S. Fass of Colodny and Fass, North Miami, Florida, for Hermogenes Manuel; and Alan I. Karten, Miami, Florida, for David List,

Respondents

A-28

SUPREME COURT OF FLORIDA

FRIDAY, JANUARY 8, 1982

STATE OF FLORIDA, Petitioner, v. FRANK J. BRADY, et al., Respondents.	* CASE NO. 59,054 * District Court of Appeal, 4th District- Nos. 78-2121 & 78-2771

Upon consideration of the Motion for Rehearing filed in the above styled cause by the attorney for Petitioner, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON and ALDERMAN, JJ., concur
McDONALD, J., dissents

TC

cc: Hon. Clyde Heath, Clerk
Hon. C. Pfeiffer Trowbridge, Chief Judge
Hon. Louise V. Isaacs, Clerk
Robert L. Bogen, Esquire
Steven M. Greenberg, Esquire
Robert P. Foley, Esquire
Janet W. Freeman, Esquire
Joel S. Fass, Esquire
Alan Karten, Esquire
Philip G. Butler, Jr., Esquire

A True Copy
TEST:
Sid J. White
Clerk, Supreme Court
By:
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA, Appellant, v. FRANK J. BRADY; PHILIP M. ECKARD; RONALD B. ELLIOT; DAVID A. LIST; HERMOGENES MANUEL, Appellees.	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF. CASE NO. 78-2121
STATE OF FLORIDA, Appellant, v. HERMOGENES MANUEL and DAVID LIST, Appellees.	CASE NO. 78-2771

Opinion filed January 16, 1980.

Consolidated appeals from the Circuit Court for Martin County; C. Pfeiffer Trowbridge, Judge.

Jim Smith, Attorney General, Tallahassee, and Robert L. Bogen, Assistant Attorney General, West Palm Beach, for appellant.

Philip G. Butler, Jr., of Foley Colton & Butler, P.A., West Palm Beach, for Appellee - Brady.

Steven M. Greenberg of Pertnoy & Greenberg, P.A., Miami, for Appellees - Elliott and Eckard.

Joel S. Fass of Colodny & Fass, North Miami, for Appellee - Manuel.

Alan I. Karten, Miami, for Appellee - List.

LETTS, J.

Involved is the forced entry by deputies without a search warrant onto 1800 acres of land, fenced, locked, occupied and posted. The trial judge granted the motion to suppress. Also involved is a speedy trial rule discharge because the information alleging attempted possession of cannabis in excess of 100 pounds did not also contain language reflecting intent to sell, manufacture and deliver. We affirm the former and reverse the latter.

The first point considered here revolves around the State's contention that reasonable expectations of privacy do not extend to "open fields" which cannot be considered part of the curtilage regardless of the fact that they may be fenced. See Hester v. United States, 44 S.Ct. 445 (1924) and U.S. ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976). However the term "open fields" does not seem to us to embrace a well fenced, locked and posted property such as exists here. For example, in United States v. Williams, 581 F.2d 451 (5th Cir. 1978) the fence was described as a dilapidated hog fence crossed by the agents at a place where it had been walked down almost to the ground. As the Williams court put it ". . . whatever minor

practical significance [the fence] may have retained for the hogs it has no legal significance for us." (at p. 454). By contrast the deputies in the case at bar could only gain entrance by cutting with bolt cutters the chain lock on a gate.

We have searched for court decisions interpreting the "open fields" doctrine discussed in Hester, supra, and for a clear definition of an open field. The case we like the best is from the Supreme Court of Wisconsin in which the defendant had killed his wife and buried her under a pile of rocks on his 40 acre unfenced farm 450 feet from the farmhouse. Conrad v. State, 218 N.W. 2d 252 (Wisc. 1974). The Conrad court discussed the trend away from fourth amendment property rights

and focused on the succeeding reasonable expectation of privacy test enunciated in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967). However, we agree with the Conrad decision that Katz did not rule out the open fields of Hester altogether. Accordingly, the question of the reasonable right of privacy may well still depend in part on whether the field is truly open or whether it is fenced with the obvious purpose of keeping people out. (See Williams, supra, at p. 453.) As the Conrad court facetiously remarked ". . . it cannot be doubted that whoever buried [the wife's] body under the rock pile did so . . . arguendo in the reasonable expectation of privacy." Notwithstanding, the Conrad court held that

because the rock pile was in an unfenced open field 450 feet from the house the evidence revealed by the search was permissible even though it constituted a "clear trespass."

It is conceded that nowhere can we find a clear-cut definition of "open fields," however the recent Fifth Circuit decision in Williams, supra, comes the closest to doing so. In Williams, as already reported, the court was dealing with an almost walked down delapidated hog fence. Yet the case several times infers that a fence would make a difference and we agree it should especially if forced entry is required. For instance on page 454 the Williams court said:

> The fence in question here was not a privacy fence or an exclusionary one; in its

> best days it was meant to do no more than keep the hogs in, not to keep anyone out. In its condition when the agents stepped over it, it offered little, if any, impediment . . . . In view of these considerations, we think that the fence was not such as to create . . . any reasonable expectation of added privacy . . . .

It is also clear that many of the cases which we have discovered that speak of open fields involve fact situations in which the property is unfenced or marginally fenced.[1] At first blush, one exception to this appears to be Care v. United States, 231 F.2d 22 (10th Cir. 1956). However,

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1. See for example United States v. Brown, 473 F.2d 952 (5th Cir. 1973) [abandoned farm - no signs - no evidence of breaking to enter - broken down chickenwire fence]; Martin v. U.S., 155 F.2d 503 (5th Cir. 1946) [unenclosed - no occupancy as a residence - no evidence of break in or signs]

even in that case the facts never suggest that access through the "hog tight fence" required forced entry.[2] Nowhere have we discovered a case where warrantless searches have been allowed based on a necessary breaking down of a fence, lock or gate to get on the property, absent exigencies which are not present in the case before us.[3] There was plenty of time to apply for a warrant here. It is claimed the

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2. See also U.S. ex rel. Saiden v. Bensinger, 546 F.2d 1292 (7th Cir. 1976) [fenced - no evidence of break in. This case is interesting for it does not find an open field to be inconsistent with a fence. It also is primarily concerned with the distance between the residence and the area searched. It catalogues several cases on this subject.]

3. The one exception, if it be one, appears to be the Norman case infra.

deputies did not think they had probable cause to get one. Lack of probable cause cannot by itself be used to bolster forced entry, quite to the contrary.

We also discuss the number of acres involved here, namely 1800, within the borders of which one defendant lived in a trailer. Should the number of acres affect one's reasonable expectation of privacy? We will not endlessly reiterate the subject matter of the many cases cited in this opinion. Suffice it to say that although the closer one is to the actual curtilage the more sacrosanct the reasonable right to privacy becomes, it is equally plain that the total encirclement of property by a fence obviously designed to keep people out, together with signs

telling them to do so, evinces an unmistakeable desire and expectation on the part of the occupant that no one enter. From out of the language of the sum of the foregoing cases we chose to interpret the right of privacy as reasonable under the facts of this case.

Finally we discuss and distinguish the Florida case of Norman v. State, 362 So.2d 444 (Fla. 1st DCA 1978). In Norman, as in the case before us, the deputy had no warrant and did not obtain one because he thought he had insufficient probable cause for a search. In Norman, arriving at the locked gate of the farm, the deputy climbed over a fence and walked 250 yards to a tobacco barn. Once there he shone a flashlight through the window to reveal

marijuana. The First District held that his actions were a trespass, but not an unreasonable search although the court conceded it might have taken a different view had the farm contained an occupied residence.

In reaching its conclusion the First District ignored the United States Supreme Court's shift to a reasonable right of privacy test[4] and reverted to the Hester, supra, view of fourth amendment property rights around the dwelling house and curtilage, regardless of whether the surrounding fields were fenced. We note the suggestion that Norman might have held otherwise had the farm been

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4. It could not ignore Williams, supra, from the Fifth Circuit in New Orleans which did not issue until a month later.

occupied and thus distinguish it from the case at bar. Nonetheless even if the case before us had featured an unoccupied enclosure, we would have felt compelled to predicate any result, whatever it would have been, on reasonable rights of privacy rather than the right to be secure in property.

On the second point considered, the principal case again is from the First District, this time Aylin v. State, 362 So.2d 435 (Fla. 1st DCA 1978). Aylin did indeed hold as a matter of statutory construction that the Legislature had "subsumed" the new 100 pound provision of Section 893.133(1)(a)(2), Florida Statutes (1977) into the older prohibition under Section 893.13(1)(a). This

being so, the Court concluded that the "intent to sell, manufacture or deliver" language was necessary to the information. Lacking it, the charge there under consideration was held to be a first degree misdemeanor requiring trial within 90 days.

In the case now before us, we cannot blame the Trial Judge for following Aylin, since we at the Fourth District had not spoken on the subject. However, we disagree with Aylin and are of the opinion that the Legislature must have intended otherwise.

Possession of any amount of cannabis (unless it is a first offense possession of less than 5 grams) is already a third degree felony under Section 893.13(1)(e). This being so, why go to the trouble of enacting a

new provision under Section 893.13(1)(a)(2) declaring it to be a second degree felony to possess over 100 pounds, if the Legislature really did not mean to do so and only intended to restate that the possession of in excess of 100 pounds of cannabis remained a third degree felony as it already was in any event? Such an enactment would be utterly without reason and cannot have been intended.

Under Aylin the result is that possession of 6 grams of cannabis is the same offense as possession of 6 million tons of cannabis, unless the intent to sell, manufacture or deliver language is included in the information, even though the Legislature has enacted a new provision which reads:

". . . except that the sale, delivery, or possession of in excess of 100 pounds of cannabis as controlled in s. 893.03(1)(c) shall constitute a felony of the second degree . . . ."

We readily concede that this newly enacted language has been inserted into the chapter at a confusing and unfortunate place. (In fact, the whole chapter is a mass of confusion). Nevertheless, while we fault the ineptness of the legislation rather than the subsuming analysis of Aylin, we disagree with the First District's version of what the Legislature could possibly have intended.

We therefore hold that the mere possession of in excess of 100 pounds of cannabis is a second degree felony and accordingly, the attempted possession thereof a felony in the third

degree and subject to the 180 day speedy trial rule.

We recognize that in view of our affirmance of the motion to suppress, this latter conclusion might be moot. Notwithstanding, it may not, and in any event the point is significant, for our ruling here puts us in direct conflict with the First District.

AFFIRMED IN PART, REVERSED IN PART.

MOORE, J., concurs.
RIVKIND, LEONARD, Associate Judge, concurring in part, dissenting in part.

I agree with the result the Court has reached and concur in its affirmation of the order granting motion to suppress. I respectfully dissent from the portion of the opinion which holds that mere possession of over 100 pounds of cannabis constitutes a second degree felony. I believe that Aylin v. State,

362 So.2d 435 (Fla. 1st DCA 1978) was correctly decided and would follow the decision of our sister court.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA,

Appellant,

v. CASE NO. 78-2121
and 78-2771

FRANK J. BRADY, et al.,

Appellee.

March 19, 1980

BY ORDER OF THE COURT:

ORDERED that the Appellant's January 30, 1980 Motion for Rehearing and/or Suggestion for Certification of Questions to the Supreme Court of Florida, is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH, CLERK

cc: Attorney General
Steven M. Greenberg, Esq.
Robert P. Foley, Esq.
Alan Karten, Esq.
Bruce H. Fleisher, Esq.
Joel S. Fass, Esq.

cms

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Joint Appendix

Office - Supreme Court
FILED
JUL 19 1982
ALEXANDER L. STEVAS, CLERK

CASE NO. 81-1636

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

JOINT APPENDIX

ROBERT L. BOGEN
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Counsel for Respondents

PETITION FOR CERTIORARI FILED MARCH 5, 1982

CERTIORARI GRANTED MAY 24, 1982

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5.	Manuel Motion to Suppress (September 25, 1978)	20
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The Fourth District Court of Appeal of the State of Florida rendered an opinion on January 16, 1980, upholding the circuit court order granting the Motion to Suppress. That opinion is cited at 379 So.2d 1294, and is found in the Appendix to

the Petition for Writ of Certiorari, at page A-29.

The Florida Supreme Court rendered an opinion on October 15, 1981, approving the District Court of Appeal's decision. That opinion is cited at 406 So.2d 1093, and is found in the Appendix to the Petition for Writ of Certiorari at page A-1.

RELEVANT DOCKET ENTRIES IN THE CIRCUIT COURT FOR MARTIN COUNTY, FLORIDA

Petitioner brought two appeals before the state appellate courts, one with reference to a state speedy trial rule issue (Fourth District Court of Appeal No. 78-2771), and one with reference to the open fields doctrine issue presently before this Court (Fourth District Court of Appeal No. 78-2121). Records were compiled in each of the two appeals, although the appeals were ultimately consolidated by the state appellate courts. Petitioner prevailed on the state speedy trial rule issue, and that record is irrelevant to the proceedings in this Court. Consequently, all references to the record which are contained in the Joint Appendix and the briefs before this Court are references to that portion of the state appellate court records designated as Fourth District Court of Appeal No. 78-2121.

INSTRUMENT OR HEARING	RECORD PAGE
Brady, Eckard Information (July 11, 1978)	163-164
Elliot Information (July 11, 1978)	161-162
List, Manuel Information (August 29, 1978)	188

Brady Motion to Suppress
(August 16, 1978) 181-182

Elliot, Eckard Motion to Suppress
(September 1, 1978) 196-197

List Motion to Suppress
(September 22, 1978) 201-204

Manuel Motion to Suppress
(September 25, 1978) 205-207

Transcript, Motion to Suppress Hearing
(September 26, 1978) 1-123

Orders Granting Suppression
(October 2, 1978) 308,313

[R 181]

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY,
FLORIDA. CRIMINAL DIVISION

CASE NO. 78-171

STATE OF FLORIDA,)
)
Plaintiff,)
)
vs.)
)
FRANK J. BRADY,)
)
Defendant.)
)

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendant, FRANK J. BRADY, by and through his undersigned attorney, and moves this Court to suppress the evidence in the abovestyled cause. The specific evidence to be suppressed is a quantity of marijuana and other items seized from the Defendant's ranch on April 22, 1978. As grounds therefore the Defendant would show unto

the Court as follows:

1. On April 22, 1978, the Defendant, FRANK J. BRADY, was on his ranch in Indiantown, Florida, when he was approached by several members of the Martin County Sheriff's Office, as well as law enforcement agents of the Palm Beach County Sheriff's Office and United States Drug Enforcement. At that time the Defendant was arrested and his automobile searched. The officers also searched the nearby aircraft also parked on his property. During the course of the automobile and aircraft search a quantity of marijuana was seized. On the basis of the evidence seized criminal charges were filed in the abovestyled cause.

2. The officers acted unlawfully where they entered the Defendant's fenced, posted property, searched his

automobile and the aircraft, and seized evidence without first obtaining a search warrant.

3. The officers acted unlawfully where they entered the Defendant's fenced, posted property, searched his automobile and the aircraft and seized evidence without sufficient factual information to establish probable cause that contraband was on the property.

4. The officers acted unlawfully by entering the Defendant's

[R 182]

property, searching his automobile and aircraft and seizing evidence where the officers actions were based on information obtained from an illegal wire tap and thus the seizure of the evidence was "fruit of the poisonous tree". (The Defendant's Motion to Suppress Oral

Communications filed herein is hereby incorporated by reference into the present Motion).

WHEREFORE the Defendant respectfully request this Court to suppress the evidence in the abovestyled cause.

[Certification of Service omitted in printing.]

FOLEY, COLTON & BUTLER, P.A.
406 North Dixie Highway
West Palm Beach, Florida 33401
Tele: 832-1744

/s/
ROBERT P. FOLEY

[R 196]

IN THE CIRCUIT COURT OF THE
19TH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NOS. 78-235 CF
78-171 CF

STATE OF FLORIDA,

Plaintiff,

v.

RONALD B. ELLIOTT,

Defendant,

and

PHILIP M. ECKARD,

Defendant.

MOTION TO SUPPRESS EVIDENCE

COMES NOW the Defendants, Ronald B. Elliott and Philip M. Eckard, by and through their undersigned attorneys, and hereby move this honorable Court to suppress the evidence in the above-styled causes. The specific evidence to be

suppressed is a quantity of marijuana and other items seized from the Defendants' possession on April 22, 1978. As grounds therefor, the Defendants would show unto the Court as follows:

1. On April 22, 1978, an aircraft leased in the name of Jody's Restaurants, Inc., was landed on the Frank J. Brady ranch in Indiantown, Martin County, Florida. The Defendant, Ronald B. Elliott, is an officer of, and a major stockholder in Jody's Restaurants, Inc. The Defendant, Eckard, was allegedly operating or a passenger in said aircraft. Since the Defendants Elliott and Eckard are charged with jointly possessing said contraband with Frank J. Brady, a Defendant in Case No. 78-171, as consolidated with Case No. 78-235, they

have a possessory interest in said seized contraband.

2. Said aircraft was then approached by several members of the Martin County Sheriff's Office and other Florida and Federal law enforcement officers.

[R 197]

3. Said officers were conducting a surveilance on the private property of Frank J. Brady's ranch prior to said aircraft landing.

4. When said aircraft landed, the aforementioned officers searched the aircraft and a vehicle which had parked nearby and seized certain alleged contraband which allegedly had been partially unloaded from the aircraft.

5. All of the aforementioned actions of the officers were conducted

without a lawful search warrant or probable cause.

6. Further, the information which caused said officers to enter upon the Brady ranch and conduct the surveilance was obtained pursuant to an illegally obtained interception of the telephone of Ronald B. Elliott, hence said seizure of said conversations was the "fruit of the poisonous tree". The Defendants' Motion to Suppress oral communications filed herein is hereby incorporated by reference into the present motion.

WHEREFORE, the Defendants respectfully request this Court to suppress the evidence in the above styled causes.

[Certification of Service and signature omitted in printing.]

[R 201]

IN THE CIRCUIT COURT OF THE
19TH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. 78-254

STATE OF FLORIDA,
Plaintiff,
vs.
DAVID LIST,
Defendant.

MOTION TO SUPPRESS AND
MEMORANDUM OF LAW

COMES NOW the Defendant, DAVID LIST, and respectfully moves to suppress and accordingly exclude from introduction into evidence and/or use, whether derivative or otherwise, all items seized, procured and otherwise obtained by the State from both the premises described as The Brady Ranch on State

Road 710, Indiantown, Florida, and one 1978 pick-up truck tag no. X97979, for the following reasons:

1. That all of such evidence was procured, seized and otherwise obtained by Government agents as a result of an illegal search and seizure effected in contravention of the laws and constitutions of the United States of America and the State of Florida and in violation of the rights as guaranteed by Section 12 of the Declaration of Rights to the Constitution of the State of Florida and the Fourth and Fifth Amendments to the Constitution of the United States.

2. That all such evidence was procured, seized and otherwise obtained without Defendant's consent and/or without lawful authority or process of law.

3. That all such evidence was

procured, seized and otherwise obtained without lawful process in that the same was effected without either warrant or probable cause; that further, and notwithstanding the absence vel non of probable cause, no exigent circumstances were present, sufficient to either authorize or justify the warrantless

[R 202]

entry of the aforedescribed private property and premises.

4. The property was illegally seized without a warrant. Further, the Defendant asserts that the particular evidence sought to be suppressed is a quantity of marijuana which the Martin County Sheriff's Department has in its possession and personal belongings taken from the person of the Defendant at the time of his arrest.

5. That the subject search and consequent seizure were not incident to the lawful arrest of the Defendant herein and that no lawful or proper circumstances were present or otherwise occasioned to make such search and seizure valid and lawful.

6. That all such evidence was procured and otherwise obtained as a result of a warrantless exploratory and/or unreasonable search of private premises and property.

STATEMENT OF FACTS

The Defendant's Motion is predicated upon the following statement of facts and reasons arising therefrom:

a. On April 21, 1978, Lt. Al Frawley of the Martin County Sheriff's Office received a telephone call from a Drug Enforcement Administration Agent

and received information that a twin engine Cessna plane would be arriving at the Brady Ranch at Indiantown, Florida, in the p.m. hours of August 21, 1978. Lt. Frawley was further advised that the plane would have one of two serial numbers and would be carrying marijuana.

b. Lt. Frawley stated on deposition that he did not know who supplied the Drug Enforcement Administration Agent with his information and did not question the agent as to the reliability of either the information received or the source of that information.

[R 203]

c. Lt. Frawley further testified that Captain Fogelman of the Palm Beach County Sheriff's Office gave him similar information but that he again did not ask Captain Fogelman any questions

concerning the source of the information or the reliability of the informant.

d. Based upon this information and this information only, the Martin County Sheriff's Department sent several police officers to the Brady ranch for a surveillance on April 21, 1978.

e. On April 22, 1978, Lt. Frawley received another telephone call from Captain Fogelman. Captain Fogelman advised Lt. Frawley that the plane would be landing at the Brady Ranch sometime in the early p.m. hours of April 22, 1978.

f. Lt. Frawley again did not inquire of Captain Fogelman as to the source of his information or its reliability.

g. Lt. Frawley testified that he was the officer in charge and did not

seek a search warrant from any of the six available judges in Martin County, because he did not believe that there was probable cause for a search warrant.

h. Despite the fact that he did not have probable cause, Lt. Frawley led several police officers on April 22, 1978 on to the Brady Ranch property without the permission or authority of anyone authorized to give permission or authority.

i. After a short time a plane landed and Lt. Frawley and other officers rushed to the plane without seeing what was being unloaded from the plane.

j. It was not until the officers came within a few feet at most of the airplane that they saw dark opaque plastic bales.

k. The officers at this point still did not see marijuana.

[R 204]

l. Neither the Drug Enforcement Agent nor Captain Fogelman was present or took any part in the surveillance of April 21, 1978, or the surveillance and subsequent arrest of April 22, 1978.

m. The Defendant, DAVID LIST, was arrested approximately one-half mile from the airplane by Deputy Al Green and Detective Shires of the Martin County Sheriff's Department.

n. Both officers testified on deposition that they did not observe the Defendant, DAVID LIST, commit a crime in violation of the Laws of the State of Florida in their presence, but arrested the Defendant because of the prior arrest made at the plane.

o. The Defendant was searched at the scene and personal property was removed from his person without probable cause to search him or even to arrest him.

p. The above facts were testified to by Lt. Frawley, Sgt. DeLudos, Detective Shires, Corporal Cchommaker, Sgt. Murphy, and Deputy Al Green on August 18, 1978, in deposition in the Office of the State Attorney.

WHEREFORE, the Defendant prays the Court to Suppress as evidence in this cause any and all physical evidence seized by police or other agents of the State from the Defendant's personal or constructive possession.

[Certification of Service and signature omitted in printing.]

[R 205]

IN THE CIRCUIT COURT OF THE
19TH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. 78-254 and
78-173

STATE OF FLORIDA,

Plaintiff,

vs.

HERMOGENES MANUEL and
DAVID LIST,

Defendants.

MOTION TO SUPPRESS EVIDENCE
OBTAINED THROUGH UNREASONABLE
SEARCH AND SEIZURE

The Defendant, by and through his undersigned attorney, respectfully moves this Honorable Court, pursuant to Rule 3.190(h) of the Florida Rules of Criminal Procedure to Suppress as evidence in this cause any and all physical evidence seized by police or other

agents of the State from the Defendant's personal or constructive possession on the following grounds:

1. The evidence was obtained through an unreasonable search and seizure in violation of the Defendant's rights guaranteed by the Fourth Amendment and Due Process Clause of the Fourteenth Amendment to the United States Constitution and by Article One, Section 12 of the Florida Constitution (1968).

2. The property was illegally seized without a warrant. Further, the Defendant asserts that the particular evidence sought to be suppressed is a quantity of marijuana which the Martin County Sheriff's Department has in its possession and personal belongings taken from the person of the Defendant at the

time of his arrest.

3. The Defendant's Motion is predicated upon the following statement of facts and reasons arising therefrom:

a) On April 21, 1978, Lt. Al Frawley of the Martin County Sheriff's Office received a telephone call from a Drug Enforcement Administration Agent and received information that a twin engine Cessna plane would be arriving at the Brady Ranch at Indiantown, Florida in the p.m. hours of August 21, 1978. Lt. Frawley was further advised that the plane would have one of two serial numbers and would be carrying marijuana.

[R 206]

b) Lt. Frawley stated on deposition that he did not know who supplied the Drug Enforcement Administra-

tion Agent with his information and did not question the agent as to the reliability of either the information received or the source of that information.

c) Lt. Frawley further testified that Captain Fogelman of the Palm Beach County Sheriff's Office gave him similar information but that he again did not ask Captain Fogelman any questions concerning the source of the information or the reliability of the informant.

d) Based upon this information and this information only, the Martin County Sheriff's Department sent several police officers to the Brady ranch for a surveillance on April 21, 1978.

e) On April 22, 1978, Lt. Frawley received another telephone call from Captain Fogelman. Captain Fogelman advised Lt. Frawley that the plane would

be landing at the Brady ranch sometime in the early p.m. hours of April 22, 1978.

f) Lt. Frawley again did not inquire of Captain Fogelman as to the source of his information or its reliability.

g) Lt. Frawley testified that he was the officer in charge and did not seek a search warrant from any of the six available judges in Martin County, because he did not believe that there was probable cause for a search warrant.

h) Despite the fact that he did not have probable cause, Lt. Frawley led several police officers on April 22, 1978, on to the Brady ranch property without the permission or authority of anyone authorized to give permission or authority.

i) After a short time a plane

landed and Lt. Frawley and other officers rushed to the plane without seeing what was being unloaded from the plane.

j) It was not until the officers came within a few feet at most, of the airplane that they saw dark opaque plastic bales.

k) The officers at this point still did not see marijuana.

l) Neither the Drug Enforcement Agent nor Captain Fogelman was present or took any part in the surveillance of April

[R 207]

21, 1978, or the surveillance and subsequent arrests of April 22, 1978.

m) The Defendant, Manuel, was arrested approximately one half mile from the airplane by Deputy Al Green and Detective Shires of the Martin County

Sheriff's Department.

n) Both officers testified on deposition that they did not observe the Defendant, Manuel, commit a crime in violation of the Laws of the State of Florida in their presence, but arrested the Defendant because of the prior arrests made at the airplane.

o) The Defendant was searched at the scene and personal property was removed from his person without probable cause to search him or even to arrest him.

4. The above facts were testified to by Lt. Frawley, Sgt. DeLudos, Detective Shires, Corporal Cchommaker, Sgt. Murphy, and Deputy Al Green on August 18, 1978, a deposition in the Office of the State Attorney.

WHEREFORE, the Defendant prays the Court to Suppress as evidence in this

cause any and all physical evidence seized by police or other agents of the State from the Defendant's personal or constructive possession.

[Certification of Service omitted in printing.]

COLODNY & FASS
Attorneys for Defendant
11601 Biscayne Boulevard
North Miami, Florida 33181

/s/
JOEL S. FASS

EXCERPTS FROM TRANSCRIPT OF
MOTION TO SUPPRESS HEARING
(SEPTEMBER 26, 1978)

IN THE CIRCUIT COURT OF
MARTIN COUNTY, FLORIDA

TESTIMONY OF FRANK BRADY

[R 4]

* * * * *

Q. Is this a fenced ranch?

A. Yes, it is.

Q. Is it totally fenced and totally enclosed?

A. Totally enclosed.

Q. Is is posted?

[R 5]

A. It is posted.

Q. And what type sign? Do you have around the perimeter of the ranch?

A. Just says no trespassing and no hunting.

Q. It says posted also?

A. Oh, yes.

Q. Now, do you have gates on the fence?

A. Yes, they did.

Q. Are your gates left open or closed?

A. They are locked after 5 o'clock in the afternoon. After the workers go home.

Q. What type of locks?

A. Padlocks.

Q. Is this ranch open to the public at all?

A. Never.

* * * * *

[R 6]

* * * * *

Q. How many acres is your ranch?

A. 1800 acres.

* * * * *

Q. And it's totally used for your cattle operation and your horses?

A. Right.

* * * * *

Q. . . . Now, is there an airstrip on this property?

A. Yes, there is.

Q. . . . And did you have any timing device on the lights on your airstrip?

[R 7]

A. Yes, I did.

* * * * *

Q. And how were the gates locked? With a regular padlock or what?

A. . . . it was locked with a padlock that a piece of iron that come across the

[R 8]

gate that supported where you lock it at.

Q. And a regular padlock with a key?

A. Right.

* * * * *

Q. Now, during the evening hours did you see policemen, law enforcement officers, on your property on this particular ranch? On April 22nd 1978?

A. Yes, I did.

Q. All right, did they show you any search warrant at all?

A. They did not.

Q. Did you, your wife or any of your help give anybody permission to enter that property? Any police officers or any law enforcement officers?

A. No, did not.

Q. You know how they gained entrance to your property?

A. Yes.

Q. How?

A. Well, found evidence where they rammed the front gate, busted it down and they used bolt cutters and cut the chain on the back gate and left it laying.

* * * * *

[R 16]

* * * * *

Q. Mr. Brady, how far is your -- did you have a house or a trailer out there on the ranch?

A. Trailer.

Q. Okay, how far is that trailer from the end of the airstrip?

A. I'd say, oh, 2,000 feet.

Q. Now, the area where the sheriff's office arrested you on the -- April 22nd 1978, how far is that area from the area of your trailer?

A. About the same distance. It was at the end of the airstrip.

Q. What kind of fence did you have around the property, Mr. Brady? Is it chain link or barbed wire?

A. Barbed wire.

Q. Okay. Just one more question. Do you have any other buildings on that property other than the trailer? A barn or anything of that nature?

A. Yes.

[R 17]

Q. All right. Was either the trailer or the barn or any other building on that property searched by any members of law enforcement on April 22nd 1978?

A. No, they was not.

* * * * *

Q. You were -- what time of the day

or night was it, sir?

A. I think it was somewhere around 9:30 or 10 o'clock.

Q. At night.

A. At night.

[R 18]

* * * * *

Q. And the officers were how far from you when you first saw them?

A. Oh, maybe 30 or 40 feet.

Q. Which is approximately how far from your closest boundary fence?

A. Oh, three-quarters of a mile.

* * * * *

TESTIMONY OF CAPTAIN DEMPSEY

[R 21]

* * * * *

Q. All right. What information did you have in your possession?

A. That an air craft was going to be

coming into the South Florida area and it would be possibly loaded with contraband. The approximate time element and certain radio frequencies would be used.

* * * * *

[R 24]

* * * * *

Q. And this was the same frequency that Frank Brady's lights were to be (indiscernable)?

A. I don't know, sir, I did not see the equipment on the ground at Frank Brady's.

Q. You knew that he had that he had that equipment on his ranch didn't you sir?

A. We heard some information reference to a strip that was Frank Brady's. However, our (indiscernable) of

Frank Brady's we thought was close to his residence.

Q. But you knew Frank Brady had the lights on -- that would be activated by that radio frequency didn't you, sir?

[R 25]

A. Yes sir. The information was that they kept refering to a ranch, and we felt that this was just Brady's ranch. I did not know that much about the Brady Ranch.

Q. And you felt that the plane was going to land carrying contraband didn't you, sir?

A. Yes sir.

Q. And in fact, it did land there at the Brady Ranch using that frequency didn't it sir?

A. The (indiscernable) that was later

given to us I did not know -- like I say the exact location. I wasn't familiar with Martin County or Palm Beach County. This is the reason I made contact with Palm Beach County. In fact, Mr. Brady lived in Palm Beach County.

* * * * *

TESTIMONY OF LT. FRAWLEY

[R 28]

* * * * *

Q. When did you first receive information regarding the Brady Ranch?

A. Approximately 2 p.m. on Friday, April 21st 1978.

* * * * *

Q. And what was this information that you received?

A. Essentially that one or two planes or possibly both planes would be --

* * * * *

A. Basically Mr. Magno told me that he received information that two planes possibly two planes would be landing at the Brady Ranch. And at that time he gave the numbers of the two planes.

* * * * *

[R 29]

* * * * *

Q. Did you know what they would be carrying?

A. He indicated contraband which I would assume to be marijuana.

Q. Did he specifically tell you marijuana?

A. I believe he said marijuana and/or cocaine.

* * * * *

Q. All right, what did you do after

securing that?

A. After talking -- while talking with Captain Vogerman said to set up a surveillance at the Brady Ranch on that evening. . . .

* * * * *

A. At that time we drove out to I believe to be the

[R 30]

southwest corner of the ranch, the Brady Ranch and took up a surveillance point of the ranch itself.

* * * * *

Q. Did you enter on any fenced land of Mr. Brady's on that night?

A. Not to my knowledge, no.

* * * * *

Q. All right. How long did you wait there?

A. We terminated at approximately 11 o'clock p.m.

[R 31]

Q. Was there any activity -- when I say activity, I mean planes landing at the Brady Ranch on April 21st 1978?

A. None to my knowledge.

* * * * *

Q. Did you ever receive any more information about this plane landing at the Brady Ranch?

A. Yes, . . . he supplied me with a radio frequency number that he indicated the plane to be using . . . The planes would be around dusk in on the 22nd and that they would key this frequency and it would automatically turn on the runway lights.

* * * * *

[R 32]

* * * * *

A. On the 22nd we had additional personnel and we broke up into three surveillance teams. . . .

* * * * *

A. To the best of my knowledge Detective Lockwood and Carter Osleber were situated in Orange Grove I believe

[R 33]

south of the main gate off State Road 710.

Q. Would that be on or off the Brady property?

A. To my knowledge it would be off the property.

Q. Where were you and Sergeant Murphy set up?

A. Sergeant Murphy and I come in I believe southeast gate and come

into a pasture I believe it would be on the west side, east side, -- south side of the airstrip.

Q. Is that on Brady property?

A. I believe so, yes.

* * * * *

Q. And where were the third surveillance team set up?

A. They were instructed to go further back I believe the west end of the ranch which would be the west end of the airstrip area.

Q. On Brady's property?

A. On Brady's property.

* * * * *

[R 34]

* * * * *

Q. What did you do after you saw the plane land?

A. Saw the plane land and Sergeant

Murphy and I immediately started towards the -- the plane landed from east to west and Sergeant Murphy and I started in a general direction of the aircraft.

* * * * *

Q. Did you see anything in the Jeep Scout?

A. Yes, the back end of the Scout was loaded with bales with black plastic covering.

Q. Did you determine at that time due to your police experience and training what those bales contained?

A. My experience and training it indicated marijuana.

* * * * *

[R 35]

* * * * *

Q. All right. Was the doorway or

the hatchway to the airplane open or closed when you arrived?

A. When I arrived it was open.

Q. See anything in the airplane that you could recognize?

A. Same type bales.

Q. From outside the airplane looking in -- I don't mean inside the airplane.

A. You could observe it from the outside.

* * * * *

Q. All right. Detective, I think the thousand dollar question or ten thousand dollar question why didn't you have a search warrant for that ranch on April 22nd, 1978?

A. Well, in my opinion obtaining search warrants in Martin County, which I've obtained a number of, I don't really

know of a judge that will sign a search warrant without a complete legal description of

[R 36]

what you're searching. The subject of the search was not there at the present time. Had the numbers and possible Cessna and possible twin engine. If I obtained the search warrant -- if I wrote a search warrant on those grounds, I don't believe a judge would have signed it. And I couldn't obtain a search warrant for a vacant airstrip because that wasn't the subject of the search to begin with.

Q. So, you were going to search whatever plane and/or vehicles were located in that area, correct?

A. If it followed through with the

probable cause that we had previously.

Q. Did you even know whether there were going to be any vehicles involved that would have to be searched?

A. We didn't have that information, no.

* * * * *

Q. All right. Did anyone to the best of your knowledge either at your direction or to the best of your knowledge search any dwelling or residence or building on the Brady Ranch that evening?

A. Not to my knowledge, no.

Q. Was any evidence obtained that resulted in the arrest

[R 37]

of Mr. Brady, Mr. Gulisano, Mr. Eckard and for this matter, Mr.

Elliot, obtained from looking into any building or dwelling or structure?

A. Not to my knowledge.

* * * * *

[R 39]

* * * * *

Q. When you crossed the railroad tracks did you see the signs at Frank Brady Ranch?

A. I don't recall seeing any signs, no.

* * * * *

[R 40]

* * * * *

Q. And what is the exact information that you received?

A. Talking again to Captain Vogleman from the Palm Beach County Sheriff's Department. He advised he received information that the same two planes,

same plane numbers, would possibly be landing at the Brady

[R 41]

Ranch that evening around dusk. And further related an air frequency number that they were using to automatically turn on the landing lights once they did approach.

* * * * *

[R 43]

* * * * *

Q. How did you enter the ranch?

A. I believe it was the southeast corner. Aluminum type

[R 44]

gate. And there appeared to be a road going in there. That chain was cut and the gate was opened and after inside, it appeared we couldn't drive the truck in so we

walked in.

Q. Who cut the chain?

A. I believe it was Sergeant Murphy.

Q. And with what instrument was the chain cut with?

A. With bolt cutters.

* * * * *

Q. Was that sign present when you cut -- when the fence was cut and you entered?

[R 45]

A. I don't know. It was dark. I don't recall seeing it.

* * * * *

TESTIMONY OF LT. WETHINGTON

[R 61]

* * * * *

Q. All right. How did you get on Mr. Brady's property?

A. I walked, sir.

Q. Climb over any fences?

A. Yes sir, I did.

* * * * *

[R 63]

* * * * *

Q. Okay. Did you walk up to the jeep?

A. Yes sir.

Q. Did you observe anything in the jeep?

A. Yes sir.

Q. Where were you located? Were outside the jeep or inside the jeep when you observed --

A. I was standing just outside the driver's door which was open. I never touched the jeep itself.

Q. What did you see?

A. What appeared to be bales of marijuana wrapped in dark plastic covering. Somewhat rectangular in shape.

[R 64]

Q. Backing up a little bit do you know why you were out there that evening? On surveillance? What was that for?

A. I'd been advised that there was going to be a drop made at either the Brady Ranch in Indiantown or another location.

Q. What does drop mean to you?

A. An aircraft bringing in contraband to be off loaded in the vehicle or stored in buildings.

Q. All right. Now, in your police training and police work as a narcotics detective with agent in Palm Beach County, have you ever had occasion to smell marijuana?

A. Yes sir, I have.

* * * * *

A. Yes sir, there was an odor coming

from the interior of the vehicle in question. And it smelled like marijuana.

* * * * *

[R 65]

* * * * *

A. The International Scout in question was backed up behind the left wing of the aircraft in question next to the cargo doors located on the left side of fuselage.

* * * * *

Q. Prior to entering the airplane, could you see anything from outside the airplane on the inside?

A. Yes sir, I saw the same type package material inside the airplane as I saw in the rear of the International Scout.

Q. Did you associate any particular

odor in the area of the airplane?

A. Yes sir.

Q. Would it be the same odor you described emanating from the jeep?

A. Yes sir.

Q. At any time did you or anyone to your knowledge search any structure or dwelling located on that Brady Ranch?

A. No sir, to my knowledge, no. . . .

[R 67]

* * * * *

A. I was advised by my immediate supervisor --

* * * * *

A. Advised me that large quantity of narcotics was possibly being smuggled into the Glades area in the very near future. And that white male, Frank Brady, would be receiving

said contraband at either his residence on Hatcher Road or at the Brady Ranch located near Indiantown, Martin County, Florida.

* * * * *

[R 68]

* * * * *

Q. But you knew it was going to be at one or the other places?

A. Yes sir.

Q. And did anything happen on April 21st?

A. No sir, not at my surveillance point.

Q. When did you discontinue your surveillance and why?

A. I remained at that location until approximately 1:15 hours on the 22nd. That's 1:15 in the morning. And being that there was no activity at that airstrip, I discontinued

the surveillance.

Q. And when was the next time you received any information regarding this case?

A. On the 22nd I received information at 5:15 in the afternoon --

* * * * *

[R 71]

* * * * *

Q. Did you cut the fence?

A. No sir.

Q. Did you climb over the fence?

A. Yes sir.

Q. What type of fence did you climb over?

A. Barbed wire.

* * * * *

[R 72]

* * * * *

Q. Did you have any sniper scopes or

night scopes?

A. Yes sir, I had a Staratron (phonetic) Night Scope.

Q. Would you describe to the court what this is and how you utilized it? On April 22nd 1978.

A. Yes sir, it's an instrument which picks up any type of light and magnifies the light at night where objects can be seen clearly.

* * * * *

Q. What actually did you see?

A. What time are you talking about?

Q. When the plane landed.

A. Observed the plane land. It taxied to the west end of the runway where the engines were shut down. I observed the vehicle back up to the aircraft at which time I proceeded to the area of the aircraft . . .

[R 75]

* * * * *

A. Yes sir, I seen probably three or four thousand bales similar to that which contain marijuana.

* * * * *

[R 308]

IN THE CIRCUIT COURT OF THE
19TH JUDICIAL CIRCUIT,
IN AND FOR MARTIN COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO. 78-254

STATE OF FLORIDA,)
)
Plaintiff,)
)
vs.)
)
HERMOGENES MANUEL)
and DAVID LIST,)
)
Defendants.)
)

ORDER ON DEFENDANT'S MOTION TO
SUPPRESS PHYSICAL EVIDENCE

THIS CAUSE, came on to be heard upon the Defendants' Motions to Suppress the marijuana ceased by the police in this cause and the State and the Defendants having stipulated that the testimony taken by this Court in the case of State vs. Elliott, et al. (Case No: 78-235) should be applied by

this Court to make the ruling in the case and the Court having heard and considered that testimony and being otherwise being fully advised in the premises it is;

ORDERED AND ADJUDGED:

That the Defendants' Motions to Suppress the Physical Evidence seized by the police from the Defendants' personal or constructive possession is granted.

DONE AND ORDERED in Chambers, at Martin County, Florida, this 26 day of Oct., 1978.

/s/ C. Pfeiffer Trowbridge
CIRCUIT JUDGE

Copies Furnished To:

Office of the State Attorney
Counsel for Defendants

[R 313]

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR MARTIN COUNTY,
STATE OF FLORIDA

CASE NOS. 78-171; 235

STATE OF FLORIDA,
Plaintiff,
-vs-
FRANK J. BRADY;
PHILIP M. ECKARD;
RONALD B. ELLIOT,
Defendants.

ORDER

THIS CAUSE coming on to be heard upon the Defendants' Motion to Suppress the physical evidence herein, and after hearing arguments of counsel, and upon due consideration thereof, it is

HEREBY ORDERED AND ADJUDGED that the Defendants' Motion to Suppress the physical evidence be and hereby is

GRANTED.

DONE AND ORDERED in Stuart, Martin County, Florida, this 2d day of October, 1978.

/s/ C. Pfeiffer Trowbridge
CIRCUIT JUDGE

cc: State Attorney's Office
Attorney Steven M. Greenberg
Attorney Robert P. Foley
Attorney Alan Karten
Attorney Joel Fass
Attorney Bruce H. Fleisher

Opposition

Office - Supreme Court, U.S.
FILED
MAY 5 1982
ALEXANDER L. STEVAS
CLERK

CASE No. 81-1636

in the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, PHILIP M. ECKARD
RONALD B. ELLIOTT, DAVID A. LIST,
and HERMOGENES MANUEL,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STEVEN M. GREENBERG
Attorney for Respondents

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CASE NO. 81-1636

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, PHILIP M. ECKARD
RONALD B. ELLIOTT, DAVID A. LIST,
and HERMOGENES MANUEL,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STEVEN M. GREENBERG
Attorney for Respondents

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744 N.W. 12th Avenue
Miami, Florida 33136
(305) 545-5700

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE FLORIDA SUPREME COURT CORRECTLY CONSTRUED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HOLDING THAT THE "OPEN FIELDS DOCTRINE" OF HESTER v. UNITED STATES, 265 U.S. 57 (1924) WAS INAPPLICABLE TO THE INSTANT CASE, WHERE CONTRABAND WAS SEIZED FROM AN 1,800 ACRE OPEN FIELD, JUST BECAUSE THE FIELD WAS BARBED WIRE FENCED, LOCKED AND POSTED?

WHETHER ARTICLE 1, SECTION 12 OF THE CONSTITUTION OF THE STATE OF FLORIDA PRECLUDES THIS COURT FROM EXERCISING ITS DISCRETION TO GRANT CERTIORARI IN THIS CASE?

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STATUTES

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The undersigned, counsel for FRANK J. BRADY, PHILIP M. ECKARD, RONALD B. ELLIOTT, DAVID A. LIST, and HERMOGENES MANUEL, hereby responds to the Petition for Writ of Certiorari of the State of Florida.

OPINIONS BELOW

The decision of the District Court of Appeal of the State of Florida, Fourth District, and that of the Supreme Court of Florida, are reproduced in the Petition for Writ of Certiorari of the State of Florida.

JURISDICTION

Respondents deny that this Court has jurisdiction pursuant to 28 U.S.C. Section 1257(3). The issues in this case can be and were fully determined pursuant to Article 1, Section 12 of the Florida Constitution, which is reproduced below:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particulary describing the place or places to be searched, the person or persons, thing or things to

be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles of information obtained in violation of this right shall not be admissible in evidence.

STATEMENT OF THE CASE

The Respondent, FRANK J. BRADY, at the time of his arrest had possession, pursuant to a thirty year lease with an option to buy, of a ranch located in Martin County, Florida. The ranch was totally fenced with tightly strung multi-strand barb wire, surrounded by a drainage ditch, and posted at regular intervals, including the gates, with "no trespassing" signs. Photographs admitted into evidence at the suppression hearing clearly show these signs. The ranch is never open to the public. It is cultivated and used for raising cattle and horses and consists of approximately 1800 acres. There is an air strip on the property approximately 2000 feet from the trailer in which Mr. Brady lived. On the night in question the gates to the fence were padlocked and secured.

Approximately 2 hours prior to the landing of an airplane on his property on April 22, 1978, police officers from the Martin County Sheriff's Department, accompanied by an NBC news team, cut

through padlocks on the gates, rammed them down with motor vehicles or otherwise pushed them aside, and cut through the barb wire in order to effect entry on to the property.

For several days prior to the arrests, the Polk County Sheriff's Department had been monitoring an interception (the legality of which is still being contested) on the telephone of the Respondent, RONALD B. ELLIOTT. At 2:00 p.m., on April 21, 1978, Detective Lieutenant Albert Frawley of the Martin County Sheriff's Department received a call from Ray Magno of the DEA Office in West Palm Beach, Florida. Magno relayed from the Polk County Sheriff's Department the evidence garnered by the wiretap. Frawley was told that two Cessna airplanes were going to be landed at the Brady ranch that evening carrying contraband, possibly marijuana or cocaine. Frawley was given the registration numbers of the airplanes at that time.

That evening Frawley, Lientenant Suttle of the Palm Beach County Sheriff's Office and Sergeant Murphy of Martin County set up a surveillance at the Brady ranch. Nothing occurred.

No entry was made at the Brady ranch on that occasion.

The next day, the 22nd, Frawley received further information that the planes would land that night, and was supplied with radio frequencies which the planes were to be using. He was further told that around dusk the identified frequency would be used to trigger the runway lights at the Brady ranch. Surveillance was set up at approximately 7:00 p.m., on April 22, 1978, at which time the break-ins occurred. The suspect plane landed some 2 or 2 1/2 hours later.

Although Martin County has County Court judges and 2 permanent and 1 part time Circuit judge and although the State conceded that it had ample time and opportunity to apply for a warrant, no one attempted to do so. Neither a judge nor a state attorney was ever contacted regarding the planned raid and no judicial officers were asked to be on standby. An NBC camera team was contacted however, and was driven to the scene in a car of the Sheriff Polk from Martin County.

The heavily armed officers then broke into the tight enclosure which surrounded the property, doing a considerable amount of physical damage to the property. They entered in this manner, despite the fact that their information had proven incorrect on the preceeding night, and despite seeing no activity which would justify an invasion of this type or magnitude. Photographs of the extent of the damages were admitted into evidence without objection by the State. The State never contested the fact that the damage reflected that done by the officers as they invaded the Defendant's property.

Respondents argued successfully in the trial court, and subsequently in the appellate courts of Florida, that the actions of the officers were in contravention of the Fourth Amendment to the United States Constitution. These courts specifically ruled that Hester v. United States, 265 U.S. 57 (1924) was inapplicable to the facts of this case, and that the principles of Katz v. United States, 389 U.S. 347 (1967) should control.

REASONS FOR DENYING THE PETITION

The first hurdle Petitioner must surmount involves the jurisdiction of this Court. Article 1, Section 12 of the Florida Constitution is essentially a restatement of the Fourth Amendment to the U.S. Constitution. However, the last sentence of the Florida provision establishes a State exclusionary rule which is independent of the Federal case law. This poses two monumental problems for the Petitioner.

First, it constitutes a clear caveat to this Court in that it provides a basis for the decision which is independent of the U.S. Constitution and laws. Since the decision of the Florida Supreme Court would be the same even if the Federal law did not support Respondents' position, this Court must necessarily refuse jurisdiction. Although the Florida Courts did rely in part on Federal case law, they also relied on prior rulings of the State Courts of Florida and other states (See, e.g. Norman v. State, 379 So.2d 643 (Fla. 1980); Conrad v. State, 218 N.W.2d 252 (Wisc. 1974).). Therefore, the decision of the Florida

Supreme Court in the case sub judice should not be reconsidered by this Court.

Second, the exclusionary provision found in Article 1, Section 12 of the Florida Constitution completely invalidates the arguments of Petitioner based on Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Again, the evidence in the case sub judice was, or would be excluded under State law.

Although Respondent believes this argument to be totally dispositive of the issues raised by the Petition of the State of Florida, an abundance of caution dictates that all of the State's arguments be refuted.

Petitioner asserts two basic lines of reasoning in an effort to convince this Court to grant its Petition. First, it maintains that the courts below incorrectly applied the law to the facts in this case. Second, it asserts that these are compelling policy grounds justifying the granting of the Petition. Respondents disagree with both lines of reasoning.

The State has attempted to build a logical construct on two factual bases. The first is that the area invaded by the police was "open fields," and the second is that the actions of the police constituted a "mere trespass". Both bases are false and beg the question.

The Petitioner's position is that "open fields" exist in every area which is not part of a building, or the curtilage of a building (particulary a dwelling), regardless of the fact that these areas may be fenced (How this analysis would deal with the Katz telephone booth situation would make interesting reading). Petitioner urges that ". . . to conclude the contrary would extend the protection offered by the Fourth Amendment to an absurdity by allowing open fields to become a refuge for criminals or criminal activity."[1]

The speciousness of this reasoning is readily apparent. Is a dwelling and its curtilage a "refuge for criminals or criminal activity"? It is merely an area into which the State may not enter without obtaining a warrant based upon prob-

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[1] Petition for Writ of Certiorari, pp 7-8.

able cause. It is not a sanctuary for criminals; it is an area which the founders of our country felt should not be invaded without the buffer of a neutral magistrate between police and citizen.

The "absurdity" here is that the State of Florida is arguing, after an armed invasion involving the destruction of property, that a warrant was unnecessary because the State lacked probable cause![2] What better example of the need for a neutral magistrate could Respondent cite?

It is undisputed that much of the property at the Brady ranch was "fields", but only a sophist could call it "open". To do so, one would have to conclude that no enclosed area would be subject to Fourth Amendment protection unless it contained a building. Other than making the 1800 acre ranch into a building, it is difficult to imagine what further steps the Respondent Brady could have taken to transform an open field into an enclosed area. Once you put a dike around it, erect a tight barbed-wire fence, post "no trespassing" signs, bar

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[2] Id. p 8.

and lock the gates, and totally exclude the public, even the State should begin to realize that an expectation of privacy exists.

Nevertheless, the Petitioner insists on citing cases which do not apply to the facts of the case sub judice. In DeMontmorency v. State, for example, which Petitioner cites on pages 14 and 15 of its Petition, the Court specifically disguishes the DeMontmorency factual situation from the Brady situation (401 So.2d 858, at 861-2) saying:

> State v. Brady, 379 So.2d 1294 (Fla. 4th DCA 1980), obviously represents a rather firm view that enclosed occupied (perhaps even unoccupied) land cannot lawfully be subjected to search by trespassing officers. In Brady, entry was made by officers without a warrant onto 1,800 acres of land which was well fenced, locked and posted property, upon a portion of which the defendant lived in a trailer. Also, the Brady opinion points out that the deputies gained entrance to the property by cutting with bolt cutters the chain lock on a gate. The opinion furnishes no further details as to proximity of the point of entry to the dwelling itself, nor is there further description of the nature of the fenced area of surrounding property. The locked gate, the fact that the property was posted, and the forced entry are facts which tend to distinguish Brady from the case now before us.

> Further, the Brady opinion questioned this court's decision in Norman v. State, 362 So.2d 444 (Fla. 1st DCA 1978), because of its reliance upon the concept of property rights surrounding the dwelling house and curtilage, rather than the reasonable expectation of privacy test enunuciated by the United States Supreme Court in recent decisions.*

Likewise, Giddens v. State, 274 S.E.2d 595 (Ga. 1980) is inapplicable. The Court specifically noted (at 597) that:

> "The wire fence of a type commonly used to restrict movement of livestock posed little obstacle to the entrance of law enforcement officers who were only later aware that the gate to the field was locked. The officers received no notice prior to their entry that the owner or rightful occupant forbade such entry".

Furthermore, in Giddens, the Officers did not see chains and batter down two gates to effect entry. Only the facts differ in Giddens and the case at bar, the underlying retionales are compatible.

Conrad v. State, 218 N.W.2d 252 (Wisc. 1974) is even further removed from the facts in case sub judice and, in fact, was cited approvingly by the Fourth District in its opinion (See Appendix to

*Emphasis provided by Respondent.

Petitioner's Brief, pp. A 32-4]. The Conrad court was faced with a factual situation involving a search in a totally unfenced and unprotected area. For the Petitioner to state that "The high courts of Florida and Wisconsin thus present divergent views of the 'open fields' doctrine on materially identical facts". is, at best, totally misleading.

Similarly, the Federal cases cited by Petitioner are, at best, marginally on point. In United States v. Basile, 569 F.2d 1053 (9th Cir. 1978), officers crossed a railroad right of way fence and peered into a seemingly abandoned panel truck. Most of the factors the lower court relied on in the case at bar are not present in Basile.

United States v. Brown, 473 F.2d (5th Cir. 1973), relied upon by Petitioner, concerned the searching of an abandoned farm. Brown, in that case, claimed no ownership or possessory interest in the farm.

United States v. Cain, 454 F.2d 1285 (1972), involved the searching of a "hunting club" which was open to the public. It was licensed by the State of Illinois as a wild goose hunting area. Agents entered the club area through an open,

public gate during working hours.

United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976) in a curious case in that the Katz line of cases is never even mentioned by the Court. It is similar to Fullbright v. United States, 392 F.2d 432 (10th Cir. 1968) in that there is nothing in the record of either case to indicate that the Defendants made any attempt to insure privacy. In fact, the Fullbright panel specifically stated (at 435):

> By this we do not mean to say that surveillance from outside a curtilage under no circumstances could constitute an illegal search in view of the teachings of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is our opinion, however, that on the record before us in light of Hester the observations in question may not be deemed an unreasonable search if they were made from outside the curtilage of the Marzett farm.

Thus, while the language in these five Federal cases gives some hope to Petitioner, the facts of each case clearly do not sustain its position. Furthermore, because of the provisions in Article 1, Section 12 of the Florida Constitution, these cases have no application in Florida.

If Federal cases are to be applied, however, Respondents suggest that the Court consider United States v. Hersh, 464 F.2d 228 (9th Cir. 1972), which contains an excellent recitation (at 230) of the factors to be considered in determining if a search of this nature is reasonable.

The cases closest on point to the case sub judice are State v. Carter, 636 P.2d 460 (Ore. App. 11/23/82), and United States v. Oliver, 657 F.2d 85 (6th Cir. 1981). With the exception of the violence utilized to achieve entry in the case at bar, the facts (and results) are startlingly similar in Carter and Oliver. Certainly, they are much closer than the facts in any of the cases cited by Petitioner.

The second factual basis for the logical construct of Petitioner is that the actions of the police in this case constituted a "mere trespass". The trial judge was visibly upset by the destructive way in which access was gained to the Brady property. Rather than call this a "mere" trespass, Respondent would argue that this constitutes a trespass which is criminal in nature and intent.

Certainly the officers' statements that they lacked probable cause to get a warrant, coupled with their actions to forcibly enter the property, raises at least the spectre of criminal behavior.

The second argument advanced by Petitioner is a "policy" argument. It is, in fact, a blatent request for the Court to refashion the Constitution and Bill of Rights in such a way as to make their provisions inapplicable to cases involving controlled substances. In this, the State is at least consistent. It seeks to sanction the criminal actions of its police by abrogating the constitutional protections which are our only bulwark against their illegal actions. The State of Florida and the United States of America will survive the drug problem. But it is doubtful that democracy and freedom will survive the inroads which are currently being made into our individual liberties by the very persons and institutions which were sworn to uphold and protect them. "Law and Order" is, unfortunately, the clarion call of the tyrant.

UPDATE ON CASE STATUS

All charges pending in the case sub judice against FRANK J. BRADY were nolle prossed by the Martin County State Attorney's office on April 7, 1982.

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Petitioner's Brief

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CASE NO. 81-1636

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1982

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, PHILIP M. ECKARD,
RONALD B. ELLIOT, DAVID A. LIST,
and HERMOGENES MANUEL,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. WHETHER THE "OPEN FIELDS" DOCTRINE OF HESTER v. UNITED STATES, 265 U.S. 57 (1924) HAS CONTINUING VITATITY IN LIGHT OF KATZ v. UNITED STATES, 389 U.S. 347 (1967)?

2. WHETHER THE "OPEN FIELDS" DOCTRINE IS APPLICABLE TO THE INSTANT CASE, WHERE CONTRABAND WAS SEIZED FROM AN 1,800 ACRE OPEN FIELD THAT WAS BARBED WIRE FENCED, LOCKED, AND POSTED?

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CITATIONS TO LOWER COURT OPINIONS

1. The most recent lower court opinion was rendered by the Florida Supreme Court. It is cited at State of Florida v. Brady, 406 So.2d 1093 (Fla. 1981), and may be found on pages A 1-A 28 of the Petition for Writ of Certiorari.

2. The prior decision of the District Court of Appeal of Florida, Fourth District, is cited at State of Florida v. Brady, 379 So.2d 1294 (Fla. 4DCA 1980), and may be found on pages A 29-A 46 of the Petition for Writ of Certiorari.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

The opinion and judgment of the Florida Supreme Court in State of Florida v. Brady, 406 So.2d 1093 (Fla. 1981), was filed on October 15, 1981. Petitioner's timely Motion for Rehearing was denied by Order of that court on January 8, 1982. The Petition for Writ of Certiorari was timely filed on March 5, 1982, within 60 days of the Florida Supreme Court's denial of Petitioner's Motion for Rehearing. Rule 20.1, Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner brought two appeals before the state appellate courts, one with reference to a state speedy trial rule issue (Fourth District Court of Appeal No. 78-2771), and one with reference to the open fields doctrine issue presently before this Court (Fourth District Court of Appeal No. 78-2121). Records were compiled in each of the two appeals, although the appeals were ultimately consolidated by the state appellate courts. Petitioner prevailed on the state speedy trial rule issue, and that record is irrelevant to the proceedings in this Court. Consequently, all references to the record which are contained in the Joint Appendix and the briefs before this Court are

references to that portion of the state appellate court records designated as Fourth District Court of Appeal No. 78-2121.

Respondents Brady, Eckard, and Elliot were arrested and charged with delivery of marijuana in excess of 100 pounds, possession of marijuana in excess of 100 pounds, conspiracy to possess marijuana in excess of 100 pounds, and importation of marijuana (R 161-162, 163-164). Respondents List and Manuel were charged with attempted possession of marijuana in excess of 100 pounds (R 188).

The arrests and seizure of the contraband took place as the contraband was being off-loaded from a small aircraft which had just landed upon a private airstrip which was situated in

the middle of an 1,800 acre field belonging to Respondent Brady. The field was barbed wire fenced, locked, and posted.

On the day in question, Respondent Brady had possession and lived in a trailer on the ranch in question in Martin County, Florida (R 4, 16). The ranch was fenced with barbed wire and posted (JA 28-29, 33). It was totally used for cattle operation and horses (JA 29-30). It consisted of 1,800 acres (nearly three square miles) of open land (JA 29). There is an airstrip on the property (JA 30), and the trailer was approximately 2,000 feet (nearly one-half mile) from the airstrip (JA 32). On the night in question, the gate to the fence was locked and secured (JA 30-31). Respondent Brady testified

that the ranch was never open to the public (JA 29). Respondent Brady saw officers on the property during the evening hours of the night in question, without his permission and without a warrant (JA 31). No building on the property was searched on the night of the arrest (JA 33, 46).

Law enforcement officers had received sketchy information (apparently from a wiretap) that some planes carrying contraband might land on the above-referenced airstrip (JA 34-38, 53-54). Consequently, the field was placed under surveillance from outside the perimeter fence (JA 39). However, no planes landed the first night and the watch was abandoned (JA 39-40, 54-55). The next day, further information was obtained, including the fact that the

plane or planes might arrive that night and use a particular radio frequency to automatically turn on the runway lights (JA 40, 47-48, 55). As a result of this renewed information, surveillance began again that evening and the plane in question did, in fact, land.

There were three surveillance teams that evening (JA 41). One team was outside the perimeters of the fence altogether (JA 41). A second team set up surveillance within the perimeters of the fence by cutting the chain lock to one of the gates with bolt cutters and swinging the gate open (JA 41-42, 48-49). [While Respondent Brady produced pictures at the suppression hearing indicating that a gate had been rammed, said pictures were not taken until as late as two or three days after the

incident in question (R 8-9)]. The third surveillance team climbed over the barbed wire fence (JA 42, 49-50, 55). While, concededly, there were "no trespassing" signs, the officers who were asked the question testified at the suppression hearing that they were unable to see such signs (JA 47, 49).

Before too long, a plane landed, and a Jeep International Scout backed up to the aircraft next to the cargo doors (JA 52, 56). The surveillance teams proceeded to the airstrip where the plane and Jeep Scout were located, and observed approximately three or four thousand black plastic-covered bales in the airplane and the Jeep Scout (JA 42-43, 44, 50, 52, 56-57). Based upon their experience and

training, various officers testified that what they saw and smelled was, in fact, marijuana (JA 43, 51-53, 57). The arrests and seizures were then made.

All the Respondents filed their various motions to suppress the evidence seized, alleging a Fourth Amendment violation of the warrant requirement (JA 3-6, 7-10, 11-19, 20-27). Petitioner contended at the suppression hearing that there was insufficient probable cause to justify a search warrant prior to entry onto the land, and that once probable cause developed by virtue of the landing of the contraband-laden plane, exigent circumstances existed under Carroll v. United States, 267 U.S. 132 (1925). Petitioner further contended that no search warrant was necessary anyway under the "open fields"

doctrine of Hester v. United States, 265 U.S. 57 (1924). (R 90-103, 106-107). The state trial court granted the motions to suppress (R 113-122; JA 58-61).

Petitioner filed a timely direct appeal to the Fourth District Court of Appeal of the State of Florida, in which it briefed the same issue presented in the trial court (R 311). In this appeal, Petitioner asserted that the instant case was nothing more than a trespass upon open fields, regardless of the fact that these open fields may or may not have been fenced. Petitioner posited to the state appellate court that, while reasonable expectations of privacy extended to curtilage surrounding a dwelling, buildings, or fenced areas around buildings where the fence is not separated from the building by

great expanses of open land, such reasonable expectations of privacy did not extend to open fields, regardless of the fact that they may be fenced. Petitioner additionally argued that there was insufficient probable cause to obtain a search warrant to search the contraband which the officers merely hoped would land at the field. The officers could not have known with any certitude exactly where, when, or how the contraband might arrive. The Fourth District Court of Appeal of the State of Florida ruled against Petitioner's arguments. State of Florida v. Brady, 379 So.2d 1294 (Fla. 4DCA 1980); Petition for Writ of Certiorari, pages A 29-A 45.

Petitioner timely sought and obtained discretionary review in the

Florida Supreme Court, before which the issues were raised in essentially the same manner. Petitioner urged that while Respondents may have manifested a "subjective" expectation of privacy, it could not be considered a "reasonable" expectation of privacy inasmuch as the illegal activity was being conducted in the open air in the middle of 1,800 acres of open field. Petitioner concluded that the very concept of an open field is inconsistent with a reasonable, justifiable, or legitimate expectation of privacy, and that an open field should not be allowed to be a refuge for criminals by the mere act of placing a fence around those fields. The Florida Supreme Court rendered its opinion against Petitioner's arguments. State of Florida v. Brady, 406 So.2d 1093

(Fla. 1981); Petition for Writ of Certiorari, pages A 1-A 27.

The instant Petition for Writ of Certiorari was filed on March 5, 1982. Certiorari was granted on May 24, 1982.

SUMMARY OF THE ARGUMENT

I

THE "OPEN FIELDS" DOCTRINE OF HESTER v. UNITED STATES, 265 U.S. 57 (1924) HAS CONTINUING VITALITY IN LIGHT OF KATZ v. UNITED STATES, 389 U.S. 347 (1967).

Despite this Court's statement in Hester v. United States, 265 U.S. 57 (1924), to the effect that the distinction between the "open fields" and the house is as old as the common law (for Fourth Amendment purposes), Respondent contended in the State courts of Florida that the "open fields" doctrine of Hester, supra, is no longer viable in light of Katz v. United States, 389 U.S. 347 (1967). Petitioner cannot agree.

In the first place, in Katz, supra, this Court was called upon to consider an application of the Fourth Amendment under circumstances that could not

have been contemplated at the time the amendment was formulated and adopted. Katz reflected the concern that the nuances of modern day technology and electronics had to be dealt with in terms of the Fourth Amendment. Neither Katz nor its rationale interferes with the time-honored principle of the "open fields" doctrine.

Furthermore, Katz itself, as well as more recent opinions from this Court (cited in the argument portion of the instant brief), recognizes the continuing validity of the "open fields" doctrine. Katz cited the Hester doctrine on numerous occasions as an example of matters that were not covered by the Fourth Amendment. While Katz explicated that the Fourth Amendment "...protects people, not places," Justice Harlan's concurring

opinion makes it clear that the protection afforded those people requires a reference to a place and the activity being conducted. Thus, the reach of the Fourth Amendment does not turn upon the presence or absence of a physical intrusion into any given enclosure. Katz, supra. While privacy may be intruded upon by a trespass onto another's private property, it is not necessarily such privacy as will activate the protections of the Fourth Amendment, for a two-pronged test must be satisfied to claim the protections of the Fourth Amendment: (1) a person must exhibit an actual (subjective) expectation of privacy and, more importantly in the instant discussion, (2) that expectation must be one that society is prepared to recognize as "reasonable." Thus, in United States v.

Santana, 427 U.S. 38 (1976), the defendant was held not to have a reasonable expectation of privacy while standing in the threshold of her dwelling inasmuch as she was in a "public" place insofar as that term has been interpreted by this Court for purposes of the Fourth Amendment. Consequently, one may not claim the protection of the Fourth Amendment in the open field solely upon the basis of property or trespassory privacy interests.

Additionally, from a factual standpoint, an open field cannot reasonably be expected to be private. It is exposed, it is open-air, it is not self-enclosed as a house or building is. The very condition of an open field is open to view. Planes or helicopters can fly over it. It is unreasonable to expect

that the prying and curious eyes of trespassers would not invade one's subjective manifestations of privacy. Respondent Brady himself testified as to his continuing problems with trespassers (R 15-16). The open field, therefore, is inconsistent, from a factual standpoint, with reasonable expectations of privacy as defined in Katz, supra.

From a policy standpoint, the "open fields" doctrine must survive. The human relations that create the need for privacy do not ordinarily take place in these settings. The only significant interest at stake here --- a property owner's interest in excluding others from his possessions --- is not sufficient, standing alone, to bring into play legal principles which the Fourth Amendment is meant to protect. To extend

Fourth Amendment protection to an open field is to reduce the Fourth Amendment to an absurdity. It is not the legal ability under civil law to enforce one's right to exclude others which the Fourth Amendment is concerned with, but the broader concept of actual privacy.

II

THE "OPEN FIELDS" DOCTRINE IS APPLICABLE TO THE INSTANT CASE, WHERE CONTRABAND WAS SEIZED FROM AN 1,800 ACRE OPEN FIELD THAT WAS BARBED WIRE FENCED, LOCKED, AND POSTED.

Petitioner submits that the placing of a fence, or no trespassing signs, around an open field makes no difference from a Fourth Amendment standpoint. The field is still exposed, there are still great expanses of open land, airplanes or

helicopters are no less restricted in their view of the field, trespassers may still enter, a view of the field may still be obtained from higher altitudes or from neighboring land. As noted previously, the fact that the public has no legal right of access upon the land is not sufficient, in and of itself, to create the privacy expectation that the Fourth Amendment is meant to protect. Property concepts do not control a Fourth Amendment analysis. Rakas v. Illinois, 439 U.S. 128 (1978). Various jurisdictions have adopted the above analysis, in one form or another, to the effect that the Hester rule is not inapplicable merely because the land is fenced and/or posted with no trespassing signs. See cases cited in Point II, infra.

If a fence were all that was needed to come within the protection of the Fourth Amendment, the enormous profits of drug smuggling operations would allow the smugglers, as here, to buy up enormous tracts of land, put a fence around it, and claim an open-air haven within which to conduct their various illicit operations. All the courts that might hold that a fence should make a difference, merely recognize and hold controlling the fact that the property owner manifested an expectation of privacy. Those cases find a reasonable expectation of privacy merely from the property owner's satisfaction of the first prong of the Katz test. There is no discussion or consideration of the second prong, i.e., whether that expectation of privacy is one which society is

prepared to accept as reasonable. Obviously, satisfaction of this second prong does not necessarily follow satisfaction of the first prong. Otherwise, the Fourth Amendment would be absolutely nothing more than a shield for lawbreakers to use.

Finally, while there may not have been sufficient probable cause in the case sub judice for the officers to have obtained a warrant, there was certainly a sufficient degree of reliable information which justified their actions. To the extent that Respondents may argue that their property interests might, in the abstract, have been protected by less intrusive means, such issue is for another day. To begin with, the officers' conduct in the instant case was not so unreasonable. They were dealing with

drug smugglers who had their own land and air vehicles to escape in. Furthermore, excessive force in the conduct of a legal duty is cognizable under tort law. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 413 U.S. 388 (1971); §768.28, Fla. Stat. (1981).

Justice demands a balancing test. There are circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. Petitioner submits this is just such a case.

ARGUMENT

I

THE "OPEN FIELDS" DOCTRINE OF HESTER v. UNITED STATES, 265 U.S. 57 (1924) HAS CONTINUING VITALITY IN LIGHT OF KATZ v. UNITED STATES, 389 U.S. 347 (1967).

In Hester v. United States, 265 U.S. 57 (1924), the defendant was convicted of concealing moonshine liquor. Two officers had entered onto the defendant's property and saw the defendant handling moonshine whiskey. The defendant sought to exclude the evidence of the observations made by the officers on the ground that the officers had trespassed on his property. By unanimous decision, this Court flatly rejected that contention by stating, on pages 58-59:

> "It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure ...The only shadow of a ground for

> bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects" is not extended to the open fields. The distinction between the latter and the house is as old as the common law."

In Katz v. United States, 389 U.S. 347 (1967), this Court held that it was error to admit into evidence the defendant's end of a telephone conversation that was recorded, without a warrant, by means of a device placed on the outside of a telephone booth. "For the Fourth Amendment protects people, not places." Id. at 351. Thus, reasoned this Court, since Katz had a reasonable expectation of privacy when he entered the booth, closed the door, and paid the

toll for the call, it was a violation of the Fourth Amendment to record the conversation without a warrant.

Petitioner submits that Hester does indeed survive Katz. In the first place, it is apparent that, in Katz, this Court was called upon to consider an application of the Fourth Amendment under circumstances that could not have been contemplated at the time the amendment was formulated and adopted. As Katz states: "To read the constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." Id. at 352. Moreover, in his concurring opinion, Justice Harlan stated that the prior holding of this Court in Goldman v. United States, 316 U.S. 129 (1942), "that electronic surveillance

accomplished without the physical penetration of Petitioner's premises by a tangible object did not violate the Fourth Amendment," Katz at 362, must be overruled because "[I]ts limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion." Id. at 362. In other words, Katz reflected the concern that the nuances of modern day technology and electronics had to be dealt with in terms of the Fourth Amendment. United States v. Oliver, ___F.2d ___ (6 Cir. 1982), case #80-5437, op. filed May 5, 1982.

On the other hand, the Hester "open fields" doctrine draws its premise from the common law. This Court's opinion in Payton v. New York, 445 U.S.

573 (1980), made it very clear that at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion. Yet the distinction between the home and the open field is as old as the common law. Hester, supra. Neither Katz nor its rationale interfere with this distinction.

Furthermore, Katz itself, as well as more recent opinions from this Court, recognizes the continuing validity of the "open fields" doctrine. The majority opinion noted that the respective litigating parties considered it to be common ground that, on the basis of Hester, an open field is outside the reach of the Fourth Amendment. Katz at 351, note 8. More importantly, in his

concurring opinion, Justice Harlan stated: "I join the opinion of the court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 U.S. 383 ..., and unlike a field, Hester v. United States, 265 U.S. 57 ..., a person has a constitutionally protected reasonable expectation of privacy ..." Katz at 360.

Katz merely recognized that traditional concepts of property or trespassory law are not controlling with reference to one's ability to claim the protections of the Fourth Amendment. Rakas v. Illinois, 439 U.S. 128 (1978). In other words, "... the reach of that amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Katz at 353. While it is true that the Fourth

Amendment "... protects people, not places," Katz at 351, Justice Harlan's concurring opinion in Katz makes it clear that the protection afforded those people requires reference to a place. Concomitantly, as illustrated by the factual setting of Katz, the protection afforded the people by the Fourth Amendment further requires reference to the activity being conducted. In Katz, it was the aural privacy, and not the visual privacy, that was at issue. Surely, had officers witnessed Katz "taking book" with another person in the glass enclosed telephone booth, the officers' arrest and seizure of evidence would not have been vitiated on the basis of Katz's "manifestation" of an expectation of privacy.

Justice Harlan, in his concurring opinion in Katz, identified a two-

fold requirement before one may successfully urge a reasonable expectation of privacy: first, that a person had exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

> "Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open, would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. Cf. Hester v. United States, supra." Katz at 361 (Harlan, J., concurring).

Finally, as explicated by Justice Black in his dissenting opinion in Katz:

> "No general right is created by the amendment so as to give this court the unlimited power to hold unconstitutional everything

> which affects privacy." Katz at 372 (Black, J., dissenting).

Thus, while privacy may be intruded upon by a trespass onto another's private property, it is not necessarily such privacy as will activate the protections of the Fourth Amendment.

This Court has never retreated from the Hester, supra, rule and, in addition to citing that rule approvingly in Katz, has also cited that rule in a number of recent decisions. See, e.g., Donovan v. Dewey, ___U.S. ___, 101 S.Ct. ___, 69 L.Ed.2d 262 (1981) (Rehnquist J., concurring); Rakas, supra, note 12; G.M. Leasing Corp. v. United States, 429 U.S. 338, 352 (1977); United States v. Santana, 427 U.S. 38, 42 (1976); Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974); Cady v. Dombrowski, 413 U.S. 433, 450

(1973); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 413 U.S. 388 (1971) (note 6). Indeed, in Santana, supra, this Court validated a warrantless arrest of a defendant who was the subject of hot pursuit into her house after police officers attempted to make the arrest while she was standing in the doorway of her residence. This Court indicated that while it may be true under the common law of property that the threshold of one's dwelling is private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment the defendant was in a "public" place. She was not in an area where she had any expectation of privacy. How much more so must this be true with reference to an open field!

The conclusion to be drawn from Hester, Katz, Santana, and the above-referenced cases is that any expectation of privacy that might ensue with respect to an open field is not, as a matter of law, an expectation that society is prepared to recognize as reasonable. Thus, whether one takes the approach of Katz or the approach of Hester makes no difference in terms of the outcome. Even though Katz has modified Hester to the extent of injecting the privacy concept into the open fields doctrine, there is nothing in Katz signaling the demise of the principle that an individual ordinarily has no constitutionally protected right to expect privacy in open fields. 1 La Fave, Search and Seizure §2.4 (1978 Ed.).

Further, this is not to say that

police have carte blanche within an open field. Indeed, had the telephone booth in Katz been within the open field, the defendant would still retain a reasonable expectation of privacy with reference to aural interception of this telephone conversation therein.

Simply stated, Petitioner suggests that the privacy interest brought into play by the property and trespassory concepts of a privately owned open field, standing alone, are not the same privacy interests with which the Fourth Amendment is concerned, and therefore cannot control a Fourth Amendment analysis. Consequently, one may not claim the protection of the Fourth Amendment in the open field solely upon the basis of property or trespassory privacy interests.

* * * *

From a factual standpoint, it stands to reason that the concept of an open field is inconsistent with a reasonable expectation of privacy. To begin with, an open field is exposed. Even if it is fenced, it is open air; it is not self-enclosed as a house or building is. The very condition of an open field, exposed as it is, is open to view. As Katz explained, what a person knowingly exposes, even in his own home or office, is not a subject of Fourth Amendment protection. See also, Santana, supra.

There can be no reasonable expectation of privacy in an open field, where one can fly over it. See, e.g., People v. Lashmett, 389 N.E.2d 888 (Ill. 1979); United States v. DeBacker, 493 F. Supp. 1078 (W.D. Mich. 1980); Brennan v. Florida, ___So.2d ___(Fla. 2DCA 1982),

1982 Fla. L.W. 1437, case no. 82-41, op. filed July 2, 1982. Obviously, even if the field is fenced and posted, such offers no protection to aerial surveliance. One's activities in the open fields, even if fenced and posted, cannot therefore reasonably be expected to be private.

Finally, the original underpinnings of the "open fields" doctrine reflected the conclusion that it was unreasonable to expect that the prying and curious eyes of trespassers would not invade one's subjective privacy. Nebraska v. Camper, 307 N.W. 2d 820 (Neb. 1981). Thus, even a view which can only be obtained through the use of field glasses [Lee v. United States, 343 U.S. 747 (1952)], is not a violation of one's reasonable expectations of privacy.

Further, meter readers, postmen, or others who may have business or curiosity with reference to the property might reasonably be expected to breach one's manifested privacy interests as to his activities within the field. Indeed, Respondent Brady himself testified as to his continuing problems with trespassers (R 15-16). The matter is brought into sharp focus by the Second Circuit of Appeals, in United States v. Lace, 669 F.2d 46 (2nd Cir. 1982), as follows, on page 51 of that opinion:

> "If one were asked whether a person, strolling stark naked around an open yard such as the one on Beaver Brook Road, reasonably could expect to do so in privacy, we suggest that the answer would have to be "no". If this is so, there is no reason why the judiciary should clothe similarly located drug traffickers in cloaks of invisibility."

Again, this is not to say that,

if one has manifested an expectation of privacy in an open field, and that privacy is objectively reasonable outside of a mere reliance upon property concepts, the Fourth Amendment cannot be brought into play. Surely, it can. But the objective reasonableness of such an expectation of privacy must come from indicia other than a mere reliance upon property or trespassory concepts, because such concepts cannot control the issue of whether one ought to be able to claim the protections of the Fourth Amendment. Rakas, supra.

The open field, therefore, is inconsistent, from a factual standpoint, with reasonable expectations of privacy as defined in Katz, supra. Numerous courts have so stated. See, La Fave, supra, note 17; Oliver, supra.

* * * * *

From a policy standpoint, the "open fields" doctrine must survive. The Fourth Amendment and other laws protecting privacy create the conditions and the context for many relationships based on intimacy, friendship and trust. These laws establish an environment in which individual emotional and mental processes can develop freely without surveillance or interference. The legal principles that protect privacy, therefor, do not protect the desert island, the mountain top or the open field ---even one the owner has posted with a "No Trespassing" sign. The human relations that create the need for privacy do not ordinarily take place in these settings. The only significant interest at stake here --- a property owner's interest in excluding others from his possessions

--- is not sufficient alone to bring into play legal principles which the Fourth Amendment is meant to protect. This Court should not equate an individual's interest in effective concealment of evidence of a crime committed in the open air with entitlement to privacy for the purposes of the Fourth Amendment. As Justice Powell, joined by the Chief Justice and Justice Blackmun stated in their concurring opinion in United States v. Mendenhall, 446 U.S. 544 (1980), on page 561-562:

> "The public has a compelling interest in detecting those who would traffick in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffick is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including

> heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement."

The Sixth Circuit Court of Appeals, en banc, has stated that in weighing the privacy interests of the owner of open fields against the public interest in law enforcement's making random investigations to detect the production of drugs and moonshine, the public interest should prevail. Oliver, supra. To extend the concept of immunity from unreasonable search and seizure so as to prohibit the search of an open field would extend the protection afforded by the constitution to an absurdity. The Fourth Amendment protects reasonable expectations of privacy. It should not be so expansive as to make open fields a refuge for criminals.

The very concept of an open field

is inconsistent with a reasonable, justifiable, or legitimate expectation of privacy. Such a doctrine as that which would extend search and seizure protections to persons situated in the same posture as Respondent here, would be giving blanket authority for any person to buy or lease a great expanse of open land, surround it with a fence, and conduct any illegal operation out in the open air that one so chooses. One could place an air strip on the land, such as was done here, and continually and always evade the efforts of law enforcement in deterring drug smuggling. It is well known that Florida is the entry point for much of the illegal drugs that spread throughout the country. Petitioner submits that such unmitigated and unpreventable illegal activity conducted in the open air as that presented in the

case sub judice cannot give rise to a legitimate expectation of privacy, i.e., one which society is prepared to tolerate.

Further, it is clear that the reasonableness of many expectations of privacy are diminished as a matter of law, e.g., cars and planes. United States v. Chadwick, 433 U.S. 1 (1977); United States v. Bellina, 665 F.2d 1335 (4th Cir. 1981), and cases cited therein. How much more so must this be true with reference to an open field, where the only semblance of what might be a reasonable expectation of privacy lies in nothing more than property and trespassory concepts. After all, while the home stands at the very core of the Fourth Amendment (Payton, supra), the open field stands at the other end of the

spectrum (Hester, supra).

The above analysis makes it manifestly clear that Hester has indeed survived Katz. The open fields are inconsistent with reasonable expectations of privacy. Neither property nor trespassory concepts of private ownership control the issue. If one cannot demonstrate a reasonable expectation of privacy in an open field, the mere fact that he owns the field, or has put a fence around it, standing alone, does not add to the reasonableness of the privacy expectations which the Fourth Amendment is meant to protect. It is not the legal ability under civil law to enforce one's right to exclude others which the Fourth Amendment is concerned with, but the broader concept of actual privacy. Katz, supra.

ARGUMENT

II

THE "OPEN FIELDS" DOCTRINE IS APPLICABLE TO THE INSTANT CASE, WHERE CONTRABAND WAS SEIZED FROM AN 1,800 ACRE OPEN FIELD THAT WAS BARBED WIRE FENCED, LOCKED, AND POSTED.

What is the status of a field with a fence around it? Petitioner submits it makes no difference. Any expectation of privacy in an open field is not enhanced, from a Fourth Amendment standpoint, by virtue of surrounding the field with a fence. It is still exposed. There are still great expanses of open land. Airplanes or helicopters are no less restricted in their view of the field. Finally, there could be no reasonable expectation that common trespasses would not occur. Indeed, the testimony at the suppression hearing in the state courts indicated that

trespassers frequently entered upon this field (R 15-16).

Oliver, supra, involved a factual setting where police officers trespassed upon fenced fields. The en banc decision of the Sixth Circuit Court of Appeals stated as follows in footnote 4:

> "The district court's decision that Oliver had a reasonable expectation of privacy is largely based on the fact that the narcotics agents passed "No Trespassing" signs and a locked gate in making the search. If, however, they had made the search by helicopter, or on the ground but from another direction where there were no signs or a locked gate, there would have been no reasonable expectation of privacy. Thus, the decision of the district court would seem to add still another refinement to Fourth Amendment law -- i.e., their protection would depend upon the direction from which the search was accomplished. Hester, in its pristine simplicity, has obvious advantages."

See also, United States v. DeBacker, supra; People v. Lashmett, supra.

Indeed, this Court has in the past felt the need to adopt "bright line" rules in order to provide specific guidance to police and courts. Belton v. New York, 453 U.S. 454 (1981); United States v. Ross, 31 Cr.L. 3051 (1982).

In other words, despite the presence of a fence, the condition of the area is still exposed and open to view by any who care to trespass (and, as Respondent Brady indicated, it is not reasonable to expect that people will not trespass) or even view the property from higher altitudes or from neighboring land. Santana, supra. The fact that the public has no legal right of access upon the land is not sufficient, in and of itself, to create the privacy expectation that the Fourth Amendment is meant to

protect. Property concepts do not control a Fourth Amendment analysis. See, Rakas, supra.

Various jurisdictions have stated in one form or another that the Hester rule is not inapplicable merely because the land is fenced and/or posted with no trespassing signs. See, La Fave, supra, at footnotes 5 and 6. See also, e.g., Ford v. State, 569 S.W. 2d 105 (Ark. 1978) (though field was partially if not completely enclosed by fence, posted on all sides, and with locked gate to prevent entry, and police entered by cutting a chain on the gate and cutting a wire enclosure, this activity not at all covered by the Fourth Amendment, as security of "persons, houses, papers and effects" not invaded); Giddens v. State, 274 S.E.2d 595 (Ga. 1980) (though gate to

field was locked and police climbed over barbed wire fence and then entered storage building to find marijuana there, this is no search under Hester); Commonwealth v. Janek, 363 A.2d 1299 (Pa. 1976) (police officers, who entered a field that was fenced and posted, and that could not be seen from the road, were within the Hester doctrine, and the subsequently discovered marijuana plants were not suppressable); United States v. Basile, 569 F.2d 1053 (9th Cir. 1978) (Hester applicable where officers crossed fence onto private property and looked into an apparently abandoned truck which contained sugar sacks holding marijuana bricks); Martin v. United States, 155 F. 2d 503 (5th Cir. 1946) (holding enclosed or unenclosed open fields are within the Hester rationale); Monnett v. United

States, 299 F.2d 847 (5th Cir. 1962) (Hester applicable even though officers went inside a fence onto private property); McDowell v. United States, 383 F.2d 599 (8th Cir. 1967) (Hester rationale applicable even though officers trespassed through an area that was posted "No Trespassing"); United States v. Diaz-Segovia, 457 F. Supp. 260 (D.C. Me. 1978); United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976); Fullbright v. United States, 392 F.2d 432 (10th Cir. 1968); United States v. Greenhead, Inc., 256 F. Supp. 890 (D.C. Cal. 1966); DeMontmorency v. State, 401 So.2d 858 (Fla. App. 1981); People v. Lashmett, supra. Further, some

jurisdictions applied the Hester rule to even more egregious methods of trespass. See, e.g., Conrad v. State, 218 N.W.2d 252 (Wis. 1974) (police found body of murder victim by digging approximately three feet below rock pile on land about 450 feet from defendant's house); United States v. Brown, 473 F.2d 952 (5th Cir. 1973) (digging in farm land adjacent to chicken coop not a search); Nathanson v. State, 554 F.2d 456 (Alas. 1976) (fisherman had no justified expectation as to crab pots lying 35 fathoms below surface of water, marked as to ownership with buoys, even though each weighed 300 lbs. and had to be lifted with mechanical winch).

If a fence were all that was needed to come within the protection of the Fourth Amendment, the enormous

profits of drug smuggling operations would allow the smugglers, as here, to buy up enormous tracts of land, put a fence around it, and claim an open air haven within which to conduct their various illicit operations. Further, less wealthy people would be at a severe disadvantage if they were unable to erect a trespassory exclusionary fence around their property. The protections of the Fourth Amendment must not turn upon one's wealth, for, as brought home by this Court, in Payton, supra, with reference to the foundational cornerstone of the Fourth Amendment,

> "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter--all his force dares not cross the threshold of the ruined tenament!" Id. at 601, note 54.

Thus, Petitioner submits, the existence of a surrounding fence, or one's ability to surround an open field with a fence, should have no bearing upon whether or not the open fields fall within the protection of the Fourth Amendment. All the courts that might hold to the contrary merely recognize and hold controlling the fact that the property owner manifested an expectation of privacy. There was no discussion or consideration of the second prong, i.e., whether that expectation of privacy was one which society is prepared to accept as reasonable. Katz, supra, (Harlan, J., concurring opinion). See, e.g., the rationale of the Florida courts in the case presently under review. Just because one might manifest a subjective expectation of privacy, it does not follow that that subjective expectation would be

one which soceity is prepared to accept.

Further, it is not the legal right of access to property, or the legal right to exclude others from the property, which is at issue. Petitioner concedes that a property owner has a right to exclude others. However, Rakas, supra, makes it clear that notions of property law are not controlling with reference to the privacy expectations protected by the Fourth Amendment. Legal rights under civil law do not necessarily indicate the presence of a reasonable expectation of privacy for Fourth Amendment purposes. While the home is at one end of the spectrum with reference to Fourth Amendment protections, the open field is at the other end of the spectrum, despite one's attempts to keep it private. Katz was very clear in this regard. See, Point I, supra.

Finally, Petitioner acknowledges that there was no probable cause to obtain an anticipatory warrant. At most, the officers had unspecified and uncorroborated information that one or two planes (call numbers identified) may or may not land in the South Florida area, possible (or possibly not) carrying contraband. This information was obtained by wiretaps.

The officers, pursuant to their knowledge of Respondent Brady's operation, and their knowledge of the fact that Respondent Brady had an extremely large tract of land containing an air strip, suspected that Respondent Brady's ranch may be the landing site. The officers did not know an exact date. In fact, when they went to the ranch on the evening prior to the evening in question,

no planes landed. Thus, how can it be said that an anticipatory warrant could have been obtained on the basis of the sketchy, unconfirmed, hearsay information which the officers had.

The officers did have reasonable and founded suspicions about what was to take place, and that is why they sent out surveillance teams. However, they could not have known with any certitude exactly where, when, and how the contraband would arrive. Any variation in Respondents' plans from the information which the officers had knowledge of would have defeated such a search warrant. See, e.g., United States v. Gattie, 511 F.2d 608 (5 Cir. 1975); United States v. Vento, 533 F.2d 838 (3d Cir. 1976). Indeed, had the officers been able to successfully

obtain a search warrant, Respondents would have argued in the State courts that there was insufficient probable cause to support a search warrant!

The officers had information which gave rise to reasonable and founded suspicions of criminal activity which was quite possibly going to take place on the Brady ranch during sometime over the week-end in question. While this information could not rise to the level of probable cause until a plane actually arrived, it is not as if the officers had no information at all. They would have been negligent to ignore it.

However, the issue is not one of "probable cause", or of the officers' ability to obtain a search warrant, but one of whether or not Respondents had an expectation of privacy protected by the Fourth Amendment. The fact that

Respondents' property interests might, in the abstract, have been protected by less intrusive means does not, by itself, render the officers' conduct in violation of search and seizure doctrines.

To begin with, the officers' conduct was not so unreasonable. Based on the information they had, it was incumbent upon the officers to be prepared should the plane or planes arrive. Respondents had their own getaway vehicles on the property (a plane and jeeps). It was necessary that the officers had the ability to deter any getaway attempts. Police vehicles could have been necessary to block the air-strip path of the airplane, or to apprehend the Respondents should they try to escape in their vehicles or on foot following the discovery of their criminal conduct.

The above is not to say that the

cutting of fences should be approved, but the disapproval of such a trespass and the sanctions for it must come from aspects of the law other than the exclusionary rule. See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra.

Theoretically, there could be various instances where officers are properly performing government functions, but not in an appropriate manner. The remedies provided by the civil law of tort are appropriate to redress such damages. Officers executing search warrants might tear up walls and upholstery in an indiscriminate fashion while executing said warrants. However, such conduct is not a violation of the Fourth Amemdment. The Fourth Amendment is

satisfied by the warrant. In Carroll v. United States, 267 U.S. 132 (1925), police officers searched an automobile based upon probable cause but without a warrant, and in so doing, ripped open the upholstery of the seats. This Court held that there was no Fourth Amendment violation. Presumably, such holding would not have precluded the Petitioner from filing a damage suit under tort law.

Florida allows for such. §768.28 Fla. Stat. (1981). Thus, in Waters v. Dade County, 169 So.2d 505 (Fla. 3DCA 1964), the Florida appellate court held that the excessive use of force resulting in a broken arm during a constitutional arrest could appropriately be the subject of a tort action.

Thus, the damages to the fence or the manner of executing their

appropriate authority, with reference to the instant factual setting, is another issue. Respondents have their remedies. The Fourth Amendment is not implicated by such actions. (This is not to say that the same would be true with reference to the manner of execution of a warrant where a house is involved. As previously noted, houses are on the complete opposite end of the spectrum from open fields with reference to Fourth Amendment consideration. One's house is and always has been accorded special protection by the Fourth Amendment. Payton, supra.)

Based upon the information which was within the knowledge of the officers, and the fact that this case involves the open fields, Petitioner maintains that the officers' actions were quite reasonable, and not in violation of the Fourth

Amendment. Certainly, this Court cannot condone the unmitigated criminal behavior of one who buys up an extremely large acreage of land, places an air strip on the same, fences and posts the same, and then proceeds to smuggle in any contraband he sees fit under the protection of the Fourth Amendment. Indeed, when it comes to these types of activities in the open fields, the Fourth Amendment cannot extend its protection that far. Otherwise, the system of justice in this country would be made a mockery.

Justice demands a balancing test. This Court has so recognized in other settings. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968); Pennsylavnia v. Mimms, 434 U.S. 106 (1977). Petitioner submits that Respondents "subjective" expectation of privacy is not one that society is prepared to recognize as reasonable. The

second prong of the Katz test as to what constitutes a reasonable expectation of privacy has not been satisfied here.

Open air drug smuggling activities, whether or not they be within a fenced area, and whether or not they be in a secluded area, cannot be given constitutional protection. The actions of the officers herein do not transcend that level of intrusion which society is not prepared to tolerate. After all, when the performance of his duty requires an officer to enter upon private property, his conduct, otherwise a trespass, is justifiable. United States v. Johnson, 561 F.2d 832 (D.C.Cir. 1977). However, by contrast, society is not prepared to tolerate such unmitigated and unpreventable illegal activity conducted in the open air as that done by Respondents in the case sub judice.

With reference to the issues presented by this case, the balance must be struck in favor of the decent folks of society. As Justice Jackson stated in Johnson v. United States, 333 U.S. 10 (1948),

> "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." Id. at 14-15.

Petitioner submits this is just such a case.

CONCLUSION

Petitioner has demonstrated a sound factual and policy basis upon which this Court should conclude that the "open fields" doctrine should have been applied by the State courts to the end that Respondents' Motions to Suppress should have been denied. While many may argue that Katz, supra, did away with the "open fields" doctrine of Hester, supra, it is clear that this is simply not the case. Katz itself referred to the Hester doctrine as an example of matters that were not protected by the Fourth Amendment. Indeed, the very concept of an open field is utterly inconsistent with a reasonable expectation of privacy. That a fence may surround the field is of no consequence. It is not property or trespassory interests that the Fourth

Amendment is meant to protect, but actual privacy interests. Rakas, supra. Thus, while a property owner may attempt to manifest an expectation of privacy, such manifestation is not sufficient, standing alone, to constitute a satisfaction of the second prong of the Katz test: i.e., that the privacy interest must be one which society is prepared to accept. Thus, even if one does all he can to keep trespassers out of his open field, his activities are still not entitled to a reasonable expectation of privacy under the Fourth Amendment.

Damages to the fence in gaining entry to the field are not at issue in the instant case. That is a matter for tort law. A complainant has available civil remedies to redress such damages. Bivens, supra.

It would seem clear that, based upon the foregoing argument, supported by the circumstances and authorities cited therein, Respondents should not be permitted to claim a violation of their reasonable expectations of privacy, as protected by the Fourth Amendment, from either a factual or policy standpoint. Therefore, the decision of the Supreme Court of Florida, which rested solely upon an analysis of federal constitutional principles, must be reversed.

Respectfully submitted,

JIM SMITH
Attorney General

ROBERT L. BOGEN
Assistant Attorney General

Supplemental Brief

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CLERK

CASE NO. 81-1636

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1982

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, PHILIP M. ECKARD,
RONALD B. ELLIOT, DAVID A. LIST,
and HERMOGENES MANUEL,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

SUPPLEMENTAL MEMORANDUM ON "CASE OR CONTROVERSY"

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QUESTIONS PRESENTED

1. WHETHER "CASE OR CONTROVERSY" STILL EXISTS; WHETHER THIS CASE IS MOOT?

2. WHETHER QUESTIONS REGARDING "STANDING" ARE IN ISSUE IN THE INSTANT CASE?

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CONSTITUTIONAL PROVISIONS INVOLVED

The only constitutional provision involved in the instant case is the Fourth Amendment to the United States Constitution. Nonetheless, Respondents, on page 4 of the Brief of Respondents, have cited the additional involvement of Article I, §12 of the Florida Constitution, which proscribes unreasonable searches and seizures. This latter state constitutional provision is not involved, and never has been involved, in the case sub judice or in the prior court proceedings with reference to the case sub judice.

Respondents have never relied upon the Florida constitutional provision until this case came before this

Court. Furthermore, neither the Fourth District Court of Appeal of the State of Florida nor the Florida Supreme Court, in their opinions in this case, either mentioned, discussed, or relied upon any aspect of that Florida constitutional provision rendering their opinions. Thus, Respondents' efforts, initiated only for this Court, in suggesting that the opinions rendered by the Florida courts are supported by an independent state ground, must be unavailing.

In any event, the Florida Supreme Court has made it clear that Article I, §12 of the Florida Constitution provides no greater substantive protection against unreasonable searches and seizures than does the Fourth Amendment. Hetland v. State, 387 So.2d 963

(Fla. 1980), affirming State v. Hetland, 366 So.2d 831 (Fla. 2nd DCA 1979); Thurman v. State, 156 So. 484 (1934); Houston v. State, 113 So.2d 582 (Fla. 1st DCA 1959).

STATEMENT OF THE CASE

The following chronology places in perspective the posture of the case, with reference to the "case or controversy" requirement, as it presently sits before this Honorable Court.

Informations, charging all five Respondents with various offenses related to their drug trafficking activities, were filed on July 11, 1978, and August 29, 1978 (R 161-162, 163-164, 188). All the Respondents filed their various motions to suppress the evidence seized, on August 16, 1978; September 1, 1978; September 22, 1978; and September 25, 1978 (R 181-182, 196-197, 201-204, 205-207; JA 3-6, 7-10, 11-19, 20-27). The hearing on the motion to suppress was held on September 26, 1978, following which the state trial

judge granted the motions. The State raised no issue which questioned any of the Respondents' "threshhold" expectations of privacy, commonly referred to as "standing." This Court's opinion in Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), had not yet been rendered. That opinion was not rendered until December 5, 1978.

The State filed a direct appeal to the Fourth District Court of Appeal of Florida on October 2, 1978 (R 11), also before the rendition of Rakas, supra, seeking to have the state trial courts order granting the motions to suppress reversed. The State filed its initial brief on direct appeal on April 9, 1979. While this was subsequent to Rakas, supra, no factual issue had been raised by the State at the earlier motion

to suppress hearing before the state trial judge, and Florida case law precluded an appellant from raising for the first time on appeal issues and/or arguments which were not initially raised before the trial court. Castor v. State, 365 So.2d 701 (Fla. 1978). Consequently, the issue of "standing" was not raised by the State on direct appeal, and the opinion rendered by the Fourth District Court of Appeal of the State of Florida on January 16, 1980, presumed "standing" on the part of Respondents. Indeed, the "automatic standing" of Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), had not yet been overruled by this court.

The State filed its Notice invoking the discretionary jurisdiction

of the Florida Supreme Court on April 3, 1980. The State's initial brief on jurisdiction was filed on April 14, 1980. While the matter of jurisdiction was pending in the Florida Supreme Court, this Honorable Court rendered United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), and Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), on June 25, 1980. These latter cases overruled the Jones, supra, "automatic standing" doctrine. The Florida Supreme Court accepted jurisdiction over the matter on September 23, 1980. The State's brief on the merits to the Florida Supreme Court was filed on October 16, 1980. Again, no issue was raised as to any "standing" inasmuch as (1) it was felt to have been waived

under the Castor, supra, doctrine, and (2) since the measure of the Florida Supreme Court's certiorari jurisdiction was grounded upon "conflict of precedential opinions" [Ansin v. Thurston, 101 So.2d 808 (Fla. 1958)], the State was limited to the facts which supported the Fourth District Court of Appeals' opinion then under review by the Florida Supreme Court. The Florida Supreme Court rendered its opinion on October 15, 1981. As was the case in the Fourth District Court of Appeal of Florida, the Supreme Court similarly presumed "standing" on the part of Respondents.

The instant petition for writ of certiorari was filed on March 5, 1982. It made no mention of any "standing" issue inasmuch as this had never been

an issue before. Meanwhile, upon jurisdiction vesting in the state trial court pursuant to the issuance of the Florida Supreme Court's mandate, the State attempted to appropriately raise the issue of "standing" before the state trial court. In so doing, recognizing that Respondent Brady was the only Defendant who conclusively had "standing," the State entered a nolle prosequie as to the charges against Respondent Brady. As to the remaining four Respondents, the state trial judge held that the State had waived the issue of "standing" by not initially raising it earlier. However, the state trial court did extend the speedy trial time within which these four Respondents would need to be brought to trial until sixty (60) days

subsequent to the disposition of the instant case in the United States Supreme Court. The aforementioned nolle prosequie and the order extending trial time are contained in the appendix to the instant memorandum.

Thereafter, on or about May 7, 1982, Respondents filed their response to petition for writ of certiorari. In that response, on page 16, Respondents brought to the attention of this Court that all charges pending against Respondent Brady had been nolle prosequie since the petition for writ of certiorari had been filed. Nonetheless, this court, apparently recognizing that the "case or controversy" requirement existed as to the remaining four Respondents, granted certiorari on May 24, 1982. The State's initial brief on the merits

before this Court made no mention of the nolle prosequie as to Brady, in light of the fact that this Court was already aware of this fact by virtue of Respondents' representations in their prior response to petition for writ of certiorari. Respondents' brief on the merits was filed on or about October 6, 1982. Various amicus curiae briefs have been filed for both sides. This Court thereafter set the matter down for oral argument on December 8, 1982, and subsequently postponed that scheduled oral argument in an order requiring the instant memorandum.

ARGUMENT

POINT I

"CASE OR CONTROVERSY" STILL EXISTS; THIS CASE IS NOT MOOT.

True, the charges against Respondent Brady were nolle prosequie during the pendency of the petition for writ of certiorari before this Honorable Court. The nolle prosequie was entered after the petition for writ of certiorari had been filed, but Respondents brought it to light in their response to petition for writ of certiorari. Thus, this nolle prosequie is not a newly developed fact, nor is it a fact which was not known to this Court when it granted certiorari.

While Respondent Brady is no longer subject to prosecution by the State on the instant charges, the other four party Respondents are indeed

subject to prosecution by the State. These other four party Respondents have been in the case all along, in their capacities as co-defendants, co-appellees, and co-respondents. The charges against these four party Respondents were never nolle prosequie, as was the case with Respondent Brady. Rather, the speedy trial time within which these four Respondents must be brought to trial has been extended up to sixty (60) days following the completion of the instant United States Supreme Court proceedings.

Consequently, the mere fact that the state charges against one of the five Respondents have been nolle prosequie does not divest this Court of jurisdiction by virtue of the "case or controversy" requirement, because that requirement is met by the presence

of the remaining four co-Respondents.

Regardless of the above, however, even if the remaining four co-Respondents were not a part of this case, it would still not be moot. The opinion rendered by the Florida Supreme Court in the case sub judice continues to play a substantial role in the response of law enforcement to their duties. As noted in Petitioner's brief on the merits, the Florida Supreme Court has all but nullified the "open fields" doctrine in Florida. The effect is just beginning to take its toll. Relying upon its opinion in the instant case, the Florida Supreme Court has already, in DeMontmorency v. State, ___So.2d___ (Fla. 1982), 1982 Fla.L.W. 485, Fla. S.Ct. No. 61,179, Op filed October 28, 1982, quashed a lower appellate

court opinion [DeMontmorency v. State, 401 So.2d 858 (Fla. App. 1981)] which upheld the denial of a motion to suppress on the basis of the "open fields" doctrine. Thus, the underlying question persists, and is agitated by the continuing criminal activities of drug smugglers in Florida. See generally, Carroll v. Commissioners of Princess Anne, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1958). In light of the Florida Supreme Court's Brady opinion, the "open fields" doctrine no longer exists in Florida and, consequently, the State's law enforcement efforts would be substantially affected by the Florida Supreme Court's decision were it not to be reviewed by this Honorable Court. See generally, Fare v. Michael C., 439 U.S. 1310, 99 S.Ct. 3, 58 L.Ed.

2d 19 (1978).

As a result of the above, this Court should not refuse to take this case as a result of the "case or controversy" requirement inasmuch as (1) this requirement is easily met with reference to four of the five Respondents who have a personal stake in the outcome sufficient to present an adversarial point of view, and (2) this case presents a question of great public importance which, if left unresolved, severely and significantly hampers the state law enforcement community's ability to ferret out drug traffickers who begin their nationwide distribution in the State of Florida.

POINT II

QUESTIONS REGARDING "STANDING" ARE NOT IN ISSUE IN THE INSTANT CASE.

The record reflects Respondent Brady's "standing." He testified that he owned the property in question (JA 28-33). However, the record does not so clearly affirmatively reflect the "standing" of the other four Respondents. Nonetheless, as pointed out in the Statement of the Case, that issue was never raised by the State until a point in time when it was considered waived by the state trial judge. "Standing" is not jurisdictional. In Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (Fla. 1981), this Court stated that,

> "The government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation period." 451 U.S. at 209.

Consequently, it is apparent that "standing" is an issue which can be waived by the government, and it was waived by the State in the case sub judice. The State did not initially question Respondents' "standing" during the hearing on the motion to suppress. The State was thereafter foreclosed from raising such an issue for the first time on direct appeal. The State

could not raise the issue in the Florida Supreme Court for the first time. Having failed to raise the issue at all in the state courts, the State could not raise the issue for the first time before this Honorable Court. When the State, belatedly, attempted to raise the issue in the state trial court during the pendency of the petition for writ of certiorari in this Court, the state trial judge held that the State had waived the issue.

Nonetheless, the fact remains that, despite such acquiescence on the part of the State, said acquiescence occasioned by the changing state of the law during the pendency of the instant case in the various state courts (see Statement of the Case), Respondents may not be able to demon-

strate their "standing" if they were called upon to do so. Under the circumstances, if this Court is of the opinion that "standing" has not been waived by the State, the State would have no objections to this Court's relinquishing of jurisdiction to the state trial judge for the purpose of determining that factual issue, as a predicate to either quashing the Florida Supreme Court's opinion (in light of no "standing"), or setting this case again for oral argument on the merits before this Court (in light of Respondents' "standing"). Certainly, Respondents cannot claim a lack of "standing" as a means of defeating this Court's jurisdiction over the instant cause, for that position would be utterly inconsistent with the position

which Respondents have taken throughout the prior state court proceedings in this case.

CONCLUSION

Based upon the foregoing arguments, and the arguments presented in Petitioner's Initial Brief, supported by the circumstances and authorities cited, Petitioner respectfully requests that this Honorable Court continue jurisdiction over this cause and reverse the decision of the Supreme Court of Florida.

Respectfully submitted,

JIM SMITH
Attorney General

ROBERT L. BOGEN
Assistant Attorney General

APPENDIX

IN THE CIRCUIT COURT
IN AND FOR MARTIN
COUNTY STATE OF
FLORIDA

CASE NO. 78-171-CF

STATE OF FLORIDA

VS

FRANK J. BRADY

Defendant

NOLLE PROSEQUIE

COMES NOW, the State of Florida by and through its undersigned Assistant State Attorney, FRANK J. LYNCH, JR. and files this its NOLLE PROSEQUIE in the above styled case wherein the above named Defendant is charged with:

COUNT I - DELIVERY OF CONTROLLED SUBSTANCE

COUNT II - IMPORTATION OF CONTROLLED SUBSTANCE

COUNT III - CONSPIRACY TO COMMIT FELONY

COUNT IV - POSSESSION OF CONTROLLED SUBSTANCE.

DATED, this 23rd day of April, 1982.

Respectfully submitted:
ROBERT E. STONE
STATE ATTORNEY

BY: /s/
FRANK J. LYNCH, JR.
Assistant State Attorney
P.O. Box 1968
Stuart, Florida 33495

IN THE CIRCUIT COURT
OF THE NINETEENTH
JUDICIAL CIRCUIT IN
AND FOR MARTIN COUNTY
STATE OF FLORIDA

STATE OF FLORIDA

Plaintiff

vs.

PHILIP M. ECKARD
RONALD B. ELLIOT
ROBERT GULISANO
DAVID A. LIST
HERMOGENES MANUEL

Defendants

CASE NO. 78-175-CF,
78-235-CF,
78-172-CF,
78-254-CF

ORDER

THIS CAUSE coming on to be heard on the State's Motion for Extension of Speedy trial and the Court having argument of counsel and being otherwise informed in the premises, it is hereby;

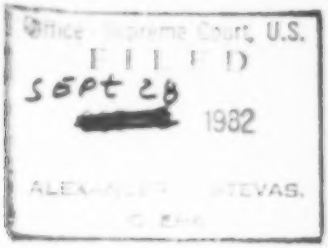
ORDERED AND ADJUDGED that Speedy Trial in the above-styled cases is extended to a date 60 days after the

United States Supreme Court either denies the State's Petition for Writ of Certiorari or, if it accepts Certiorari, 60 days after the Martin County Clerk of Court receives it's Opinion.

DONE AND ORDERED in Stuart, Martin County, Florida, on this 12th day of April, 1982.

/s/
C. PFEIFFER TROWBRIDGE
Circuit Judge

Respondent's Brief



CASE NO. 81-1636

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1982

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, PHILIP M. ECKARD, RONALD B. ELLIOTT, DAVID A. LIST and HERMOGENES MANUEL

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. WHETHER THE "OPEN FIELDS" DOCTRINE OF HESTER v. UNITED STATES, 265 U.S. 57 (1924) STILL HAS INDEPENDENT MEANING, OR MERELY REFLECTS ONE FACET IN THE DETERMINATION OF WHETHER AN EXPECTATION OF PRIVACY IS REASONABLE UNDER KATZ v. UNITED STATES, 289 U.S. 347 (1967).

2. WHETHER THE ACTIONS OF THE STATE OF FLORIDA WERE EXCUSABLE UNDER ANY RECOGNIZED EXCEPTIONS TO THE REQUIREMENT THAT POLICE OBTAIN A WARRANT BEFORE CONDUCTING A SEARCH AND SEIZURE.

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OTHER AUTHORITIES

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PREFACE

The Petitioner, State of Florida, was the prosecution in the Florida trial Court below. The Respondents were the Defendants. In this brief, the parties will be referred to as Petitioner and Respondents, respectively.

The following references are made in this Brief:

(R) For the Record-on-Appeal previously transmitted under separate cover. Page references refer specifically to the testimony taken before the Honorable C. Pfeiffer Trowbridge on September 26th, 1978, consisting of pages R1-R123.

(A) For the Joint Appendix submitted by the parties consisting of pages A1-A61.

(PB) For the Petitioner's Brief, consisting of pages PB1-PB69.

(AB) For the Appendix to Respondents' Brief, consisting of pages AB1-AB2.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Fourth District, affirming the trial court's decision to suppress the seized evidence, is reported at State v. Brady, 379 So.2d 1294 (Fla., 3rd D.C.A., 1980). The opinion of the Supreme Court of Florida affirming the Florida District Court of Appeal is reported at State v. Brady, 406 So.2d 1093 (Fla., 1981).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(d).

The opinion and judgment of the Florida Supreme Court in State of Florida v. Brady, 406 So.2d 1093 (Fla., 198), was filed on October 15th, 1981. Petitioner's timely Motion for Rehearing was denied by Order of the Court on January 8th, 1982. The Petition for Writ of Certiorari was timely filed on March 5th, 1982, within 60 days of the Florida Supreme Court's denial of Petitioner's Motion for Rehearing. Rule 20.1, Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searchs and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, Section 12 of the Florida Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the places to be searched, the person or persons, thing or things to be seized, the communications to be intercepted, and the nature of evidence to be obtained. Articles of Information obtained in violation of this right shall not be admissible in evidence.

STATEMENT OF THE CASE

Respondent successfully defended against the Appeal brought by the State of Florida in the Fourth District Court of Appeal of Florida (78-2121), and in the Petition for Writ of Certiorari filed by the State in the Supreme Court of Florida 406 So.2d 1093). All references to the record contained in the Joint Appendix and the briefs before this Court are references to that portion of the State Appellate Court records designated as Fourth District Court of Appeal No. 78-2121 (379 So.2d 1294).

Respondents, Brady, Eckard,and Elliott were arrested and charged with delivery of marijuana in excess of 100 pounds, conspiracy to possess marijuana in excess of 100 pounds, and importation of marijuana (R161-162, 163-164). Respondents, List and Manuel, were charged with attempted possession of marijuana in excess of 100 pounds (R 188).

The arrests of Brady, Eckard, List and Manuel, and the seizure of the alleged contraband took place on April 22nd, 1978 at the ranch leased by the Respondent, Brady. The Respondent, Elliott, was arrested one month later in Winter Haven, Florida. Mr. Elliott was never observed on the Brady property (R 33-4).

On the day in question, the Respondent, Frank Brady, had possession of, and lived on the ranch in question in Martin County,Florida (R 4). The ranch was totally fenced and posted (R 4-5) and was never opened to the public (R 5). It was nearly all cultivated and totally used for cattle operation and horses (R 6). It consisted of 1,800 acres (R 6). There was an air-strip on the property (T 6). On the night in question, the gates to the fence were padlocked and secured (R 7-8). Appellee, Brady, saw officers on the property during the evenings hours of the night in question (April 22nd, 1978), without his

permission and without a warrant (R 8). The next day, Brady established that both the front and back gates of the property had been broken open and the fence surrounding the property was cut open. The entries were all made in clear proxity to "no trespassing" signs posted on the gates and fence (R 10-13). Photographs of the posted signs and damaged gates were entered into evidence without objection by the State (R 10-13).

The record in the present case reflects that officers from the Martin County Sheriff's Office received information that a plane carrying suspected contraband would land at the airstrip located on the ranch of the Respondent, Frank Brady, on April 21st, 1978 (R 28-9). The officers went to the area surrounding the ranch on that date, but observed no aircraft land (R 30-1).

The next afternoon additional information was received by Lieutenant Frawley, Martin County Sheriff's Office, at approximately 2:00 p.m., to the effect that a

certain type of aircraft bearing a certain F.A.A. tail number would land at the ranch later that evening. (R 31,40). Lieutenant Frawley with a number of other officers from the Martin County Sheriff's Office went to Mr. Brady's ranch at approximately 7:00 p.m. (R 32).

Lieutenant Frawley testified that the officers split into three surveillance teams upon reaching the ranch (R 32). Officer Frawley and Sergeant Murphy, Martin County Sheriff's Office,were in one surveillance team (R 33). Upon reaching a locked gate at the Southeast corner of the ranch, Sergeant Murphy took a bolt cutter from his vehicle, cut the locked chain on the gate, opened the gate and Lieutenant Frawley and Sergeant Murphy then entered the property (R 44). This occurred at approximately 7:00 p.m., a full 2 1/2 hours prior to any airplane landing.

Photographs of Mr. Brady's ranch intro-

duced into evidence showed that the locked gates leading onto the property were rammed and then run over by a police vehicle (R 12). The Court found that as a matter of fact, this had occurred (R 121). Although Agent Mark Wetherington claimed to have climbed the fence, rather than going through the gates broken down by his fellow officers (R 61) his credibility is subject to question in light of the physical damage done to the gates. Furthermore, Detective Frawley testified that Wetherington travelled with him to the ranch and entered through the gate after Sergeant Murphy cut through the chain securing it, with boltcutters (R 43-4).

Approximately 2 1/2 hours after the officers had entered the property, the officers observed a plane land on the airstrip located on the ranch and a truck approach the plane. At that point, the officers approached the plane and truck and then arrested Mr.

Brady and several other Respondents (R 34). At no time did the officers have a search warrant to enter the property of Mr. Brady or to search any vehicle, aircraft or structure on the premises (R 35). Nor had officers obtained the consent of Mr. Brady or any other individual prior to entering the property.

At the hearing before the trial Judge, the State argued that the officers did not have sufficient information to establish probable cause to obtain a search warrant and therefore, the failure to have a search warrant should be excused (R 101-102).

Based on the evidence presented at the hearing on the Motion to Suppress, Judge Trowbridge held that the initial entry onto the property without a search warrant was unlawful. Judge Trowbridge found, as a matter of law, based on the evidence presented, that Mr. Brady had a reasonable expectation of privacy and therefore, the

officers should have obtained a search warrant. The court stated:

> "So, what is the law? That law is very simple, and it's been expressed many a time. It simply is that in order for a police agency to conduct a search, to go upon private property or into private property and conduct a search, they must have a search warrant. (R 114-115).
>
> There is just no getting around it. They had to have a search warrant to enter that property. Under those circumstances." (R 122).

In responding to the arguments of the prosecuting attorney, the Court stated:

> "(The officer) said no, he didn't have any probable cause to believe that a crime had been committed or was being committed until the airplane landed. If so, we're sort of left with the fact that these officers broke down gates and cut chains to enter private property who admit that they didn't have any probable cause and tried... (T)hey then turned around and said that the evidence seized in violation of his Constitutional right should nevertheless, be admissible," (R 121-2).

The State of Florida, having lost the Motion to Suppress, took a timely appeal to the Fourth District Court of Appeal of Florida. Petitioner argued that it did not get a warrant because it had no probable cause to do so. Apparently, the State felt that it had broader powers to conduct a search and seizure without probable cause, than it would with probable cause. Somewhat curious reasoning.

Additionally, the Petitioner argued that the State needed no probable cause to enter the Brady ranch, because it was an "open field." Its position was that a "mere trespass" onto an "open field" was constitutionally permissible and raised no Fourth Amendment questions whatsoever.

Respondent argued that the warrant requirement of the Fourth Amendment applied to the Brady Farm, and that the Petitioner's attempt to justify the raid on the ranch as

a "mere trespass" in an "open field" was sophistry. The Trial Court, the Florida Fourth District, and the Florida Supreme Court all agreed with Respondent.

Two further facts should be brought to this Court's attention. First, the Petitioner erred in its Brief when it said (at 9) that four thousand bales were seized. Approximately twenty-six bales were seized, weighing approximately 1300 lbs. Petitioner requested Respondent to bring this error to the Court's attention; it was inadvertant.

Second, all charges against Frank J. Brady were dropped by the State of Florida on April 26th, 1982. Any decision of this Court as to him would be moot.

SUMMARY OF THE ARGUMENTS

I

THE "OPEN FIELDS" DOCTRINE OF HESTER v. UNITED STATES, 265 U.S. 57 (1924) NO LONGER HAS INDEPENDENT MEANING, BUT MERELY REFLECTS ONE FACET IN THE DETERMINATION OF WHETHER AN EXPECTATION OF PRIVACY IS REASONABLE UNDER KATZ v. UNITED STATES, 389 U.S. 347 (1967).

Although Hester v. United States, 265 U.S. 57 (1924) still has some validity, it is merely one facet which must be considered by the Courts in determining whether an "expectation of privacy" as defined in Katz v. United States, 389 U.S. 347 (1967) is reasonable. The facts of this case, as delineated by the trial Court, clearly indicated that Respondents exhibited a subjective expectation of privacy, and the Supreme Court of Florida found that, in the State of Florida, their expectation was reasonable when balanced against the competing interests involved.

II

THE ACTIONS OF THE STATE OF FLORIDA WERE NOT EXCUSABLE UNDER ANY RECOGNIZED EXCEPTIONS TO THE REQUIREMENT THAT POLICE OBTAIN A WARRANT BEFORE CONDUCTING A SEARCH AND SEIZURE.

The attempt to define the area leased by the Respondent, Brady, as "open fields" belies the nature of the property. Furthermore, the armed invasion of the Brady Ranch under cover of darkness, which involved cutting fences, cutting chains of padlocked gates, and ramming down the gates with vehicles to gain entry cannot be classified as a "mere trespass" under Hester. Respondent does not purpose that the ranch should have been considered as a "sanctuary" for criminal activity, only that, on the facts of this case, a warrant should have been obtained. If the evidence was improperly obtained, the Florida Constitution requires its exclusion.

The policy of the exclusionary rule is valid, and is supported by the long years of experience the courts have had in trying to control improper police conduct by other means. It is vital to the integrity of the judicial system that illegally-seized evidence be excluded.

ARGUMENT

I

THE "OPEN FIELDS" DOCTRINE OF HESTER v. UNITED STATES, 265 U.S. 57 (1924) NO LONGER HAS INDEPENDENT MEANING, BUT MERELY REFLECTS ONE FACET IN THE DETERMINATION OF WHETHER AN EXPECTATION OF PRIVACY IS REASONABLE UNDER KATZ v. UNITED STATES, 389 U.S. 347 (1967).

Petitioner's Brief rests on an erroneous interpretation of the ruling of the Supreme Court of Florida, an attempt to ignore a massive line of cases, most of which are the progeny of this Court's decision in Katz v. United States, and what must be, by now, a deliberate bending of the facts of this case in order to bring it under the sheltering arms of Hester v. United States.

Petitioner's analysis of the question of whether the search and seizure in question was a reasonable one under the Fourth Amendment continues to be permeated with the antiquated thought that it is places, not

people, which are protected by the Fourth Amendment. The distinction between open fields, curtilage and residence, as annunciated in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) no longer has any significant meaning in Fourth Amendment analyses. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed 2d 576 (1967) rejected the notion that constitutionally protected areas can serve as talismatic solutions of every Fourth Amendment problem. The test is now whether the police conduct "violated the privacy upon which (the defendant) justifiably relied." The importance of Katz is that certain places where searches and seizures are made, do not per se, justify or make reasonable the search and seizure. Hester should now be viewed as merely an application of the principal that Fourth Amendment protections do not apply where no reasonable expectation of privacy

exists. This expectation of privacy is based upon subjective intent. In other words, the reasonableness of an expectation of privacy, based on the fact of private ownership, must be judged in the light of what a reasonable person might anticipate as to how the lands would appear to other persons. Hester no longer has any independent meaning, but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy. This is because a dogmatic and unthinking application of the Hester "open fields" doctrine will, on occasion, produce a result which is offensive to the theory underlying Katz. Katz, in the last analysis, calls for the making of an important value judgment: "Whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraint, the amount of privacy and freedom

remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." See Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev., 349, 403 (1974). The State's view of Hester and Katz would have the Court arbitrarily declare that land beyond the curtilage would be subject to scrutiny by the police no matter how careful the occupant has been to keep those lands private. Further, Katz is also likely to produce a different result than Hester when the degree of police scrutiny is particularly intense. Katz, as noted earlier, requires assessment of "the particular form of surveillance practiced by the police", while Hester - - at least as commonly interpreted - - gives the police carte blanche so long as they stay outside the curtilage. The abusive danger of Hester as compared to Katz, is that if a search is unsuccessful in its fruits, the police could,

under the blanketed provisions of Hester, proceed to make a comparable search of a whole group of private fields in the assumption that if they search long enough and far enough, they will find some evidence of some crime.

Petitioner contends that under the "open fields doctrine" of Hester, Respondents' Fourth Amendment protections do not extend to activity conducted in "open fields", and therefore, the authorities need not have obtained a warrant in order to conduct a legal search.

In Hester, revenue agents observed from across a field an exchange of moonshine whiskey in front of the defendant's residence. The defendant was arrested and convicted of concealing distilled spirits and on appeal contended that the rights under the Fourth and Fifth Amendments to the United States Constitution were violated by the trial Court's

refusal to exclude the revenue agents' testimony concerning what had occurred in the field. The United States Supreme Court, in affirming the conviction, ruled that "the special protection"accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects is not extended to the open fields."

Petitioner argues that the open fields doctrine remains viable, and that there is no constitutionally-protected reasonable expectation of privacy in an open field. Although the Hester opinion has not been overruled, subsequent opinions indicated that the open fields doctrine cannot be used as carte blanche for a warrantless search simply because the location searched is not part of a dwelling or its adjacent curtilage. As the Court later observed in its opinion in Katz:

> (T)he correct solution of Fourth Amendment problems

> is not necessarily promoted by incantation of the phrase "constitutionally protected area."
>
> * * *
>
> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

In his concurrence in Katz, Justice Harlan suggest the following two-part test for determining whether Fourth Amendment protections are warranted in a particular situation:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place". My understanding of the rule that has emerged from prior decisions is that there is a two-fold requirement, first that a person have exhibited an actual (subjective)

> expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable". Thus a man's home is, for the most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.

Under the reasoning of Katz, if the owner or occupier of a field seeks to keep it private and demonstrates an actual intention to do so, and his expectation is one that society is willing to recognize as reasonable, and Fourth Amendment protections extend to activities in that field.

In determining whether the two-fold requirement" for Fourth Amendment protection is met here, it is helpful to examine the Florida Supreme Court's opinion in Norman v. State, 379 So.2d 643 (Fla.,1980).

In Norman, a defendant convicted of

possessing cannabis contended that evidence introduced at his trial was inadmissible because it had been discovered during an unauthorized search of his farm. The local sheriff, on the basis of information received from a confidential informant, had gone to the defendant's farm, climbed a fence by a locked gate, and walked 250 yards to a barn in which he saw a substance which he identified as marijuana. He then ordered surveillance of the farm to determine who came and left. Several days later, a deputy watching the place saw a man in a truck enter through the gate, drive to the barn and later, loaded with hay, drive to the highway and into a field. The deputy detained the driver of the truck, the defendant, and took him to the sheriff's office where he was placed under arrest.

One of the points raised on appeal in Norman was whether the unauthorized search

of the farm violated the defendant's Fourth Amendment rights. The state contended that the sheriff's search of the farm was justified under the open fields doctrine. The Court disagreed, holding that the defendant's right against unreasonable searches and seizures was violated, and observed as follows:

> It seems incontestable that Mr. Norman exhibited a subjective expectation of privacy in the tobacco barn and its contents. He took overt steps to designate his farm and barn as a place not open to the public. The contraband, covered and wrapped in tobacco sheets, was in a closed structure. The farm itself was fenced, and the gate to the fence was kept locked.
>
> * * *
>
> The District Court's reliance below on the "open fields" doctrine as enunciated in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed 898 (1924), was misplaced. Hester stands for the unremarkable proposition

> that the Fourth Amendment's protection of one's person, house, papers and effect does not extend to the open fields. Whatever the precise parameters of this long-standing but seldom-used doctrine, it certainly does not extend to a warrantless search of a closed structure on fenced property.

Id. at 647 (emphasis added). The opinion in Norman made it clear that fences and locked gates are evidence of the owner's or possessor's expectation of privacy.

Obviously, there are distinctions between the facts in Norman and those in the case sub judice. The former involved a warrantless search of a closed structure, the latter a search in a field. The contraband in Norman was inside a barn and covered with tobacco sheets, while that in the case at bar, at the time of seizure, was being transferred from an airplane to several waiting vehicles. Such distinctions aside, however, the comments in Norman regarding evidence of an expectation of privacy still

have relevance here. In Norman, the Court emphasized that "(t)he farm itself was fenced, and the gate to the fence was kept locked." Later, the Court reiterated that the barn was "on fenced property." The opinion clearly indicated that the enclosure and locking of the gate was significant and influenced the Court's decision. The property in the case sub judice was not only fenced and locked, but was also surrounded by a dike and posted. Respondent unmistakably evidenced an expectation of privacy.

Having decided that Respondent clearly demonstrated an expectation of privacy, the Court considered the second part of the Katz test: whether the expectation was one that society is prepared to recognize as reasonable. The Court found under the facts in Brady that it was. Respondent, as noted before, fenced with barbed wire, locked, diked and posted his property. The Respondent's airstrip was

even fenced with barbed wire. At the time of his arrest, he was at a spot remote from any entry point to the property. He was, in fact, so remotely located that the arresting authorities, after crossing the dike and fences, had to traverse several hundred yards of field in order to get close enough to see what was going on.

The facts here are similar to those in United States v. Holmes, 521 F.2d 859 (5th Cir., 1975), in which the government appealed an order granting motions to suppress marijuana seized in a warrantless search. The goernment argued that the owners of the shed which had been searched had no reasonable expectation of privacy because there were no fences surrounding any part of the property (which was quite remote), no "no trespassing" signs posted, nor any sign of a special effort having been made to conceal the marijuana from any passerby." The Court dis-

agreed with the government, observing:

> The government would have us ignore the character of the Moody property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush by putting up signs warning the government to keep away.
>
> More to the point
>
> (T)he continuing concern with the property rights is prompted by the realization that an individual often has a very reasonable expectation of privacy in his private property, and it is this expectation which the Fourth Amendment protects. Id at 870 (Footnote and citation omitted).

The facts in Holmes are distinguishable from those at bar insofar as the object of the search there was a shed while the arrest at bar was for activity carried on in a field. However, the observation in Holmes

concerning agents crawling through underbrush is analogous to the situation here, where agents were forced to cross well-kept, posted fences and a dike, break a locked gate, and then proceed several hundred yards to observe activity on private property. Respondent's expectation of privacy, in light of all the precuations he had taken, was certainly as reasonable as that of the defendant in Holmes.

Obviously, activity conducted in an open field does not, in most cases- warrant a significant expectation of privacy. Under the facts of this case, however, and in light of the size of the property and the precautions taken by Respondent, the Florida Supreme Court found that Brady's expectation of privacy was reasonable.

Petitioner cites several cases involving open fields and warrantless searches in which Courts held that there had been no violation

of constitutional rights. The case sub judice is,however, distinguishable from those cited when analyzed in the manner suggested by Justice Harlan in Katz.

In Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974), the United States Supreme Court cited Hester and made reference to the open fields doctrine in holding that a warrantless search was proper. The Court noted, however, that "(t)he field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded." Id. at 865. The easy accessibility of the property evidently played a role in the Court's decision. Respondent here, on the other hand, went to great lengths to exclude the public from entering his land, distinguishing this situation from that in Western Alfalfa.

In United States v. Basile, 569 F.2d 1053 (9th Cir.), cert. denied, 47 U.S. 920 (1978), the Ninth Circuit Court of Appeals, citing Hester and Katz, held that evidence seized by authorities could not be suppressed since the truck in which it was found had been abandoned 100 yards from the defendant's home and thus, there could be no reasonable expectation of privacy in the vehicle. Again, however, the facts in the case cited are dintinguishable from those in the case at bar. The area in which the truck was abandoned was neither posted nor enclosed in any way which was likely to discourage entry therein. The only obstacle met by the officials in reaching the spot was an old railroad right of way fence. The accessibility of the fields here and in Basile differs significantly.

In United States v. Brown, 473 F.2d 952 (5th Cir., 1972), the Fifth Circuit Court of Appeals held permissible the search

of a chicken coop on an abandoned, unposted farm. In so holding, the Court made no reference to Katz, citing only to Hester and related cases. The facts in Brown, however, are at such a variance from those here that doubtless the search would also have been proper even if the Court had used the analysis enunciated in Katz.

United States v. Cain, 454 F2d 1285 (7th Cir., 1972), has little relevance to the case sub judice because, like Brown, the facts are significantly different. The agents that conducted the search in Cain were properly on the property for a routine supervisory inspection. The area searched was regularly open to persons paying to hunt there, and there is no indication of an expectation of privacy on the part of the owners. Also, as in Brown, the Court did not utilize the Katz test, but instead relied on the open fields doctrine in reaching

its decision.

The contention that any expectation of privacy, as to activities in plain view, is unreasonable, and therefore, the Fourth Amendment is inapplicable to a seizure of evidence located in any unenclosed space was specifically rejected in Moreseman v. State, 360 So.2d 137 (Fla., 2nd D.C.A., 1978). Cases cited by Petitioner are all clearly distinguishable on the facts and the State's arguments that observations of the activities, which are the subject of this appeal, could have been observed by aircraft helicopter or high powered binoculars misses the threshold question. It is the government's burden of proof to show that the observations were, in fact, made that way, without violating the expectation of privacy in the minds of Respondents. The record is devoid of any testimony, by any law enforcement personnel, that they did, in

fact, observe any illegal activity from outside the property of Mr. Brady's ranch.

In United States v. Miller, 589 F.2d 1117 (5th Cir., 1978), the Court held, at 1133:

> Where an owner has not attempted to secure open fields and woods from 'invasion' by a casual or any official visitor, a police officer may cross private land in order to question the inhabitants of dwellings thereon U.S. v. Hirsh, 464 F. 2d (9th Cir., 1972); See Patler v. Slayton, 503 F.2d 474, (4th Cir., 1972), (no privacy interest in unposted target range behind farm). The land involved there was not posted; there was no fence or chain to impede visitors; the officers approached openly in broad daylight. Thus, the entry was permissible... The cases cited by appellant to the contrary all involved an imperishable initial intent to search. E.g. U.S. v. Holmes, 521 F.2d 859 (5th Cir., 1975).

In United States v. Miller, 521 F.2d 859 (1975), rehearing en banc 525 F.2d 1364 (1976), affirmed en banc on this issue at 537 F.2d 227 (5th Cir., 1976). The Court

discussed the "plain view doctrine" as it related to a law enforcement agent trespassing solely to unearth evidence of a crime. Under the Miller decision, which followed United States v. Williams, 581 F.2d 451 (5th Cir., 1978), the Court applied the rational in Holmes to open fields. Clearly, the reasonable expectation of privacy in an open field which is fenced, posted, ditched and chained as to impose visitors, cannot be thwarted by law enforcement officers who trespass in order to secure a view in anticipation of a search.

The trial Court found that the Respondents had a reasonable expectation of privacy in the area where the plane landed. The Respondents did all that was humanly possible to insure their privacy. The acreage was fenced and posted and was never open to the public. A ditch or dike also surrounded the perimeter of the land, and all gates were pad-

locked. The area surrounding the airstrip was also barbed wire fenced. No officer could see alleged bales or smell marijuana until they entered the area of the second fence. The police could not see the airstrip from outside the perimeter of the ranch. The alleged smuggling was done in the heart of darkness.

The instant case differs from all other "open fields" decisions in that the officers who arrested the defendants did not see or smell contraband in "plain view" until after the defendants were arrested, and assuming that the contraband was in "plain view" before the arrest (contrary to the trial Court's findings); the State introduced no evidence regarding "exigent circumstances". Morseman, supra; Hornblower v. State, 357 So.2d 716 (Fla., 1977).

The Petitioner appears to have lost sight of the two important criteria to be

determined in deciding whether or not this search was properly made without obtaining a warrant.

First, was the enclosed property an open field? We contend that it was not. It was commercial property used by Mr. Brady in his business of ranching. As stated by the United States Supreme Court:

> The business man, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entry upon his private commercial property. See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967).

A ranch, of necessity, requires the use of large areas of space. As noted in Holmes, supra, page 870:

> The government would have us ignore the character of the Moody property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of a casual passerby, a dweller in a rural area whose property is surrounded by extremely

> dense growth need not anticipate that government agents will be crawling through the underbrush by putting up signs warning the government to keep away.

There can be no doubt that if the officers had cut the chain of a warehouse gate or broken the door without search warrant, no one would question the propriety of the ruling that the evidence should be suppressed.

The Florida Courts in interpreting Katz v. United States, supra., have not deviated in holding that each case must be determined on the particular facts and circumstances as to whether or not the individual had a reasonable expectation of privacy. Olivera v. State, 315 So.2d 487 (Fla. 2nd D.C.A., L975), Huffer v. State, 334 So.2d 1332 (Fla., 2nd D.C.A., 1977), Lightfood v. State, 356 So.2d 331 (Fla., 4th D.C.A., 1978), and State v. Detlefson, 335 So.2d 371, (Fla., 1st D.C.A., 1976).

The character of Mr. Brady's property

was examined by the Fourth District Court of Appeal in State v. Brady, 379 So.2d 1294 (Fla., 4th D.C.A., 1980), in which they questioned whether the number of acres should affect one's reasonable expectation of privacy. The Florida Supreme Court, as well as the trial Court and the Florida Fourth District Court of Appeal, chose to interpret the right of privacy as reasonable under the facts of the case.

ARGUMENT
II

THE ACTIONS OF THE STATE OF FLORIDA WERE NOT EXCUSABLE UNDER ANY RECOGNIZED EXCEPTIONS TO THE REQUIREMENT THAT POLICE OBTAIN A WARRANT BEFORE CONDUCTING A SEARCH AND SEIZURE.

It is well established in the State of Florida and in the Federal Courts that where a search and seizure are made without a warrant, that the burden of proof is on the prosecution. United States v. Impson, 482 F.2d 197 (5th Cir., 1978); Mann v. State, 292 So.2d 432 (Fla., 2nd D.C.A., 1974).

It is also firmly established that the factual determinations of the trial Court come before this Court clothed with a presumption of correctness. Jester v. State, 339 So.2d 242 (Fla., 3rd D.C.A., 1976).

It is the warrantless nature of the search which forces the State firmly onto the horns of the dilemma. Although the officers involved felt that they had probable

cause to enter onto the property, the Petitioner realized that an admission by the State that probable cause existed would be disastrous. The reason for this is obvious from the facts as stated above and from the findings of the trial Court, Fourth District Court of Appeal, and the Florida Supreme Court.

Therefore, we come to the second important determination by this Court, which is whether the officers had a right to search this fenced, locked, and reasonably protected private ranch area without a warrant. Hornblower v. State, 351 So.2d 716 (Fla., 1977), dealt with this problem and held that probable cause itself is not sufficient to support a warrantless search absent exigent circumstances. Therein, the Court stated:

> The Fourth Amendment to the United States Constitution is an expression of our founding fathers' uneasiness with the potential omnipotence of a federal

> government. It reflects the notice that an individual can never enjoy the tranquility which he deserved if the government is free to tamper with his expectations of privacy through arbitrary searches.
>
> * * *
>
> In essence, the Fourth Amendment forbids those occurences and evinces the axiom that privacy is not a gratuity which we hold at the whim of our government. Only when there is a special governmental need that can be stated with particularity, will we allow the government to intrude on an individual's privacy. (Page 717)

This case went on to note:

> That the exceptions to the principal that warrantless searches are per se unreasonable under the Fourth Amendment are subject to only a few well-delineated exceptions which have been jealously and carefully drawn. 351 So.2d 716.

As stated in Hornblower, supra, and the many federal cases listed thereunder, the burden is upon the State to demonstrate

that the procurement of a warrant was not feasible "because the exigencies of the situation made that course imperative." 351 So.2d 717. Nowhere have these criteria been met in the present situation. The officers simply opined that they did not believe a Judge would give them a warrant, but they never tested to find out if they could get it or not. The testimony stressed the availability of judges in the area. See Raffield v. State, 351 So.2d 945 (Fla., 1977), and U.S.C.A. Constitutional Amendment 4.

The United States Supreme Court has held that evidence obtained by a search and seizure made without a search warrant should be suppressed when tendered in a Federal Court when no compelling reasons justify the nonprocurement of a search warrant. That Court held that the right of privacy was too precious to entrust to the discretion of police officers.

> . . .The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 93 S.Ed 158 (1948).

In order to justify a warrantless search, police officers must show some type of exigent circumstances. The United States Court of Appeals for the Sixth Circuit has held that the Government must present proof which indicates that the evidence sought in the warrantless search was in danger of

destruction or removal. However, the Court points out that the mere possibility of the destruction of the evidence is simply not enough to justify a warrantless search. The record in the case sub judice is totally void of any hint of exigent circumstances.

The Respondents contend that the key to the issue of a finding of probable cause, and the necessity of obtaining a search warrant in the case at bar are found in the very candid comments of the Honorable C. Pfeiffer Trowbridge at the conclusion of the Motion to Suppress the illegal entry and search of the Brady ranch.

The Court stated: (R 117-122)

> This case started as far as Martin County's concerned, about 2:30 on Friday. Thirty-one hours before the airplane landed.
>
> * * *
>
> The better information on Saturday came from further interceptions of communications.

So, here we have on 2:30 Friday afternoon, Martin County Sheriff's Department knew that one of two airplanes were going to come either to the Brady ranch here in Martin County or to a place in Palm Beach County. Knew the FAA numbers. Knew they were Twins and Cessnas and that they were to be carrying either marijuana or cocaine. You had time enough to assemble surveillance teams and go out and sit that evening and find out nothing happened.***

The next day at 2:30 was when he got the second phone call. Additional information. You knew about the radio frequency that would key the landing lights. And a team was assembled - three teams were assembled when you went out there. I guess we could say that he had time to go see a Judge. You certainly had time to contact the State Attorney's Office. And somehow or other these teams went out there, and I'm told that no search warrant was obtained because the information wasn't sufficient.

Well, of course, the information as to the

legal description
of that piece of land
out there certainly
could have been
obtained between 2:00
on Friday and 9:30
on Saturday.

* * *

I'm told, well, you
couldn't issue a search
warrant because you
didn't know enough about
the - you couldn't give
a legal description of
the airplane. Now, that
sort of throws me for a
loop cause I don't know
what a legal description
of an airplane is, but
certainly if you have
the FAA registration number
there all you need because
no other airplane is
supposed to have them.
He's got a description.
Certainly the FAA files
will disclose other
information about the
make and model. Certainly
enough information that
I think a Judge would
be willing to sign a
warrant.

* * *

And yet here in my opinion
they had probable cause
from about 2:00 on Friday
afternoon on. And they

could of obtained a search warrant.

* * *

An as I've indicated I think there was sufficient evidence, sufficient probable cause to prepare an affidavit and to get a search warrant based upon what was testified here.

* * *

On Friday night they didn't break and enter Mr. Brady's property. But on Saturday night - and it seems fantastic - I had a little trouble when Lieutenant Frawley was on the stand. I really just about broke up from sadness when he announced that he was present when Sergeant Murphy cut the chain and entered that property. Now, a Lieutenant is supposed to know more than a Sergeant, and I won't comment on Sergeant Murphy, but I was going to ask him myself by what right he thought he had to cut a chain lock and go on someone's private property without a search warrant.

* * *

> So, we're sort of left with the fact that these officers broke down gates and cut chains to enter private property who admit that they didn't have any probable cause and couldn't get a search warrant if they tried.
>
> Sort of got egg on their face when they then turn around and say that the evidence that they seized in violation of his Constitutional rights should nevertheless be admissible.
>
> There is just no getting around it. They had to have a search warrant to enter the property under those circumstances.

If we concede for the sake of argument, and in opposition to the findings of the trial Court Judge that there was no probable cause, then we are left with an attempt by the Petitioner to justify behavior that cannot be condoned in a democratic society.

This the State of Florida calls a "mere trespass". It is not. It is an outrage perpetrated under the color of authority. It

is, as Judge Trowbridge said, Nazi Germany or Communist Russia. If we adopt the position of the State, we surrender our freedom. Democracy will survive marijuana; it will not survive tyranny.

The Florida Supreme Court in its well-reasoned opinion in Brady, concluded that Mr. Brady went to great lengths to demonstrate that outsiders were not welcome on his property and that a police officer could not have made it to the spot from which the drug transfer was observed without the realization that he was not to be there. The Court considered the efforts made to keep others away, the size and the seclusion of the property involved, and society's interest in protecting its citizens' privacy when in their homes and on their property. They found Brady's expectation of privacy to be a reasonable one.

In the Court's rationale, the Court

expressed that they were not putting to death the concept of the "open fields" doctrine, only the misconstruction and misapplication of Hester to the Brady ranch.

The Hester case (supra), opened an unfortunate era in jurisprudence in the courts of our country. The Hester decision itself was simple, direct, and fully justifiable in light of the particular facts, and prior decisions of our courts. But the framers of that decision never could had intended to extend it to a situation such as in the case sub judice.

Hester, lest we forget, involved a situation where revenue officers drove up on a public road until they had a clear view of the residence of Hester's father, where Hester resided. Upon seeing a car approach, they stepped off the highway onto Hester's property, and observed a liquor transaction take place from a distance of fifty to one hundred yards. A "mere trespass" into an "open field".

But the factual situation before the Court in this case is totally different. In the case sub judice, three raiding parties of officers, under cover of darkness, armed to the teeth with modern weapons and sniper-scopes (R 72), went to the Brady Ranch. With full knowledge that no illegal activity was taking place on the property at that time, they cut locks off gates, rammed gates down with their vehicles, cut down barbed wire fences, and, with a network news team, invaded the property.

Is this a Hester situation? Is it law enforcement, or is it law breaking?

> They that can give up
> essential liberty to
> obtain a little temporary
> safety deserve neither
> liberty nor safety.
>
> Historical Review of
> Pennsylvania (1759)

It is sad but true that the very agencies we depend upon to protect and ensure our liberties are those which most frequently

advocate that we abolish them in the holy cause of "security". And yet, virtually every totalitarian regime in modern history has proven that this "security" is paid for most dearly.

It is the slow chipping away of the cornerstones of our personal liberties that is the frightening aspect of our current political climate. More and more, we are condoning the illegal conduct of those who are sworn to protect us. Often, this takes the forms of small, almost insignificant actions.

For example, the United States of America, in its Amicus brief (at pages 4,7 and 14) suggests, contrary to every fact of this case elicited at the trial Court level, that the officers (among them a DEA representative) passed through a minimal barrier, one erected merely to keep out livestock. Why then, if this is true, did

the officers find it necessary to cut through and ram down two gates and a section of barbed wire fence in order to attain entry?

Furthermore, the fact that thieves and "cattle rustlers" might, from time to time, gain entrance to the property, does not answer the Fourth Amendment inquiry. Cases such as Marshall v. Barlow's Inc., 436 U.S. 307 (1978), and Mancusi v. De Forte, 392 U.W. 364 (1968) make it clear that exposure of a property to some limited segment of the public is not the sort of public exposure that removes Fourth Amendment protection against government observations.

Sometimes, the chipping away becomes a frontal assault, as when the State of Florida in its brief (at 646) seems to advocate a drug abuse exception to the Fourth Amendment to the Constitution. The Petitioner urges this Court (at 66) that ". . . the balance must be struck in favor of the decent

folks of society." But the Constitution protect all, not just those who the State of Florida deems "decent." And who, pray tell, is to protect the "decent" folk from improper, illegal, and dangerous police conduct if we scrap our constitutional protections.

Was the "exclusionary rule" established by this Court because the police and prosecutors were diligent in protecting constitutional rights, or because it was frustrated in controlling a continuing course of conduct of illegal invasions into constitutionally-protected areas.

The 12 year period between this Court's decision in Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed 1782 (1949) and Mapp v. Ohio, 81 S.Ct. 1684 (1961), marks an increasing level of frustration on the part of this Court with the lack of restraint shown by State officials in desisting from engaging in illegal encroach-

ments on Fourth and Fifth Amendment rights. As the Court said in Mapp (at 1689):

> Significantly, among those now following the rule is California which, according to its highest court, was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions***." People v. Cahan, 1955, 44 Cal. 2d 434, 445, 282 P.2d 905, 911, 50 A.L.R. 2d 513.

The Mapp Court also noted (at 1689) that in 1949, prior to Wolf, supra, almost two-thirds of the State were opposed to the exclusionary rule. By 1961, however, many more states, frustrated by the continued practice of police utilizing illegal procedures in obtaining evidence, established some version of the exclusionary rule. Since Florida did so by constitutional amendment (Article I, Section 12, Florida Constitution), the arguments of Petitioner regarding the use of other remedies in lieu of exclusion are

specious. If the evidence in this case was obtained unconstitutionally, it must, under Florida law, be suppressed.

Perhaps Judge Hilman in United States v. DeBacker, 493 F.Supp. 1078 (W.D. Mich. 1980) expressed the principle as well as anyone when he stated (at 1081):

> The ultimate question, therefore, is not whether the surveillance in this case occurred in "open fields." Instead, the issue is whether "if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." (quoting Amersterdam, Perspectives of the Fourth Amendment, 58 Minn.L.Rev. 349, 403 (1974).

It cannot be seriously contended that this kind of police practice is harmonious with the aim of a free society. What

if this property had been surrounded by a wall? Could the police bulldoze it, or blow it down with explosives because a crime might be committed three hours subsequent to the forced entry?

Certainly Respondent is not arguing, as Petitioner so gliby and speciously implied, (PB 43) that a ranch such as that owned by the Respondent, Brady, be made a refuge for criminal activity. No area amenable to Fourth Amendment protection is a refuge for criminal activities. It is merely an area where the law imposes a duty on the government to obtain the opinion of a neutral magistrate, i.e. a warrant,before entering. This is the crux of Respondents' position.

Respondents request that this Court, as it has done so many times in the past, uphold the principles of our Constitutiona. As stated over one hundred and fifteen years ago.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.
>
> Ex Parte Milligan,
> 4 Wallace 2
> 120-121 (1866)

It is undeniable that trafficking in dangerous drugs is a serious problem for our society. But we must not abrogate our constitutional protections in order to combat what is surely a transitory phenomenon. The dangers of allowing the police to operate free of judicial restraint far outweigh the dangers we face from drug trafficking. The State of Florida proved this on April 22nd, 1978.

CONCLUSION

Katz, supra, has given the Courts soundly based reasonable guidelines for determining under what circumstances an invasion of a privacy interest is constitutionally permissible or impermissible. In the case at bar, the courts of Florida have determined that under Federal standards, and under the more strict Florida standards, the evidence seized from the Respondents should be excluded.

Petitioners naked appeal to the passions aroused in this country by the perceived dangers of drug trafficking must be resisted. As Oliver Wendell Holmes, Jr., said:

> The only prize much
> cared for by the
> powerful is power.
>
> Law and the Court (1913)

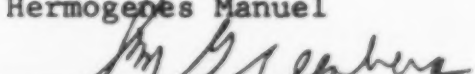
The police will take as much power as this Court and other Courts will grant. They will neither police nor restrain themselves.

It is far better that this Court err, if it does so at all, on the side of liberty. That is the history of our nation. As Holmes said in Olmstead v. United States, 277 U.S. 438, 470 (1928):

> For my part, I think it a less evil that some criminals should escape than that the government should pay an ignoble part . . . If the existing code does not permit district attorneys to have a hand in such dirty business (wiretapping), it does not permit the judge to allow such iniquities to succeed.

Respectfully Submitted,

STEVEN M. GREENBERG
Attorney for Frank J. Brady, Ronald B. Elliott, David A. List and Hermogenes Manuel



STEVEN M. GREENBERG

BRUCE FLEISHER
Attorney for Phillip M. Eckard

BRUCE FLEISHER

APPENDIX

IN THE CIRCUIT COURT
IN AND FOR MARTIN COUNTY
STATE OF FLORIDA

CASE NO. 78-71-CF

STATE OF FLORIDA,

Plaintiff,

vs.

FRANK J. BRADY,

Defendant.

NOLLE PROSEQUIE

COMES NOW, the State of Florida by and through its undersigned Assistant State Attorney, FRANK J. LYNCH,JR., and files this its Nolle Prosequie in the above-styled case wherein the above-named Defendant is charged with:

Count I - DELIVERY OF CONTROLLED SUBSTANCE;

Count II - IMPORTATION OF CONTROLLED SUBSTANCE;

Count III -CONSPIRACY TO COMMIT FELONY;

Count IV - POSSESSION OF CONTROLLED SUBSTANCE.

Dated, this 23rd day of April, 1982.

Respectfully Submitted,
ROBERT E. STONE
STATE ATTORNEY

BY _____
FRANK J. LYNCH, JR.
Assistant State Attorney
P.O.Box 1968
Stuart, Florida 33495

Supplemental Brief

Office-Supreme Court, U.S.
FILED
DEC 17 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 81-1636

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, PHILIP M. ECKARD, RONALD B. ELLIOTT, DAVID A. LIST and HERMOGENES MANUEL,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MEMORANDUM OF LAW ON STATUS OF RESPONDENTS

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QUESTIONS PRESENTED

1. WHETHER A "CASE OR CONTROVERSY" NO LONGER EXISTS AS TO THE RESPONDENT, FRANK J. BRADY, RENDERING THE ISSUES IN THIS CASE MOOT.

2. WHETHER THE ISSUES RAISED BY THE APPEAL APPLY TO THE REMAINING RESPONDENTS; AND WHETHER SAID ISSUES ARE MOOT.

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STATEMENT OF THE CASE

When Respondents' Motions to Suppress were argued before the trial Court on September 26, 1978, the issue of standing to contest the search and seizing which occurred on the Brady ranch was never raised. Since standing was believed by the State to be conferred by the "automatic" standing rule of Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 697 (1960), it never raised the issue at the trial Court level.

Although the Petitioner was alerted by this Court's ruling on December 5, 1978 in Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed. 387 (1979) the Jones rule's life to be of limited duration, it never raised the standing issue before the District Court of Appeal (State of Florida v. Brady, 379

So.2d 1294 (Fla. 4th DCA 1980). The District Court's opinion was rendered on January 16, 1980, and rehearing denied on March 19, 1980; both dates occurring after the rendering of Rakas.

Similarly, although the Jones "automatic" standing rule was directly overruled by this Court on June 25, 1980 in United States v. Salvucci, 100 S.Ct. 2547 (1980), the Petitioner failed to raise the issue of standing before the Florida Supreme Court. Salvucci was decided four (4) months prior to October 16, 1980, when Petitioner filed its first brief on the merits before the Court.

The Florida Rules of Criminal Procedure provide that a Florida Appellate Court may relinquish jurisdiction to the trial Court to make determination on specific issues such as standing.

Rule 9.600(6) provides:

> (b) FURTHER PROCEEDINGS. When the jurisdiction of the lower tribune has been divested by an appeal from final order, the court by order may permit the lower tribunal to proceed with specifically stated matters during the pendency of the appeal.

Petitioner never requested relief under this section. Nor did Petitioner ever raise the issue of standing before this Court.

However, while the Petition for Writ of Certiorari was pending before this Court, the State attempted to raise the issue before the trial Court. On April 7, 1982, Petitioner, believing that this Court would not accept certiorari, and conceding standing as to the Respondent Brady, nolle prossed all charges pending against him. In a subsequent hearing, the trial Court ruled that, under both

Florida and Federal law, the State had waived any objections as to the Respondents' standing.

On April 12, 1982 pursuant to the State's Motion an Order was entered extending the Florida speedy trial period for purposes of avoiding the expiration of the speedy trial period during the pendency of the State of Florida's Petition for Writ or Certiorari before this Court. The Order granted extension of speedy trial as to the Respondents, PHILIP M. ECKARD, RONALD B. ELLIOTT, HERMONGENES MANUEL and DAVID A. LIST. The State did not request nor did the Court order an extension of time as to the Respondent, FRANK J. BRADY.

The issue of standing (or lack of it) of the other from Respondents has never been litigated or established on the trial Court level.

ARGUMENT

I

A "CASE OR CONTROVERSY" NO LONGER EXISTS AS TO THE RESPONDENT, FRANK J. BRADY, RENDERING THE ISSUES IN THIS CASE MOOT.

Rule 3.191 of the Florida Rules of Criminal Procedure is reprinted in its entirety in the Appendix to this Memorandum (App. p. 1-15). For purposes of this case, the critical sections are 3.191(g), 3.191(h)(1), and 3.191(h)(2).

Florida case law provides that the time under the Rule expires unless affirmative action is taken by the Court to extend the period. See e.g. Rule 3.191(d)(2) (iv) F.R.Cr.P., and State v. Jenkins, 389 So.2d 971 (Fla., 1980). The period is not automatically extended by the filing of an appeal by the State. Jenkins, supra. at 974.

When the Florida Supreme Court

denied the Petitioner's Motion for Rehearing on January 8, 1982 (A-28, Appendix to Petition for Writ of Certiorari), the State of Florida had ninety days in which to bring the Respondent Brady to trial, or to obtain a further extension of the speedy trial period. F.R.Cr.P. 3.191(g). It did neither.

Subsequently, the Florida Supreme Court denied the motion of the Petitioner to delay its Mandate (App. p. 16) as did Justice Powell on February 24, 1982 (App. p. 17), and Justice Renquist on March 22, 1982 (App. p. 18). Thus, under the Florida Speedy Trial Rule, the speedy trial period continued to run. Under Rule 3.191(g), the maximum period speedy trial could have been extended after the trial court received the Mandate on January 22, 1982 was 90 days. When the

trial court further extended the speedy trial period, on April 12, 1982, App. p. 18-19) it did not extend it as to the Respondent, Brady. The period ran on April 22, 1982.

Nor can the nolle prosequi of Frank J. Brady on the 23rd day of April (App. p. 20-21) toll the period. The nolle prosequi occurred 3 days after the period expires. Furthermore, a nolle prosequi cannot be utilized as a vehicle for avoiding the Rule (See elg. F.R.Cr.P. 3.191(h)(d)). Thus, the Respondent, Brady cannot be tried, now or ever, for the charges which are currently before this Court. Moreover, since Brady has no pending charges, no case or controversy exists as to him. A decision by this Court will not affect any interest of his.

ARGUMENT

II

THE ISSUES RAISED BY THIS APPEAL DO NOT APPLY TO THE REMAINING RESPONDENTS; AND MAY BE MOOT.

The four other Respondents, Elliott, Eckard, List and Manuel concede that a decision by this Court would affect their interests. However, this is only true because of the Petitioner's negligent failure to raise the standing issue, and consequently, its waiver of this issue. Stealgald v. United States, 101 S.Ct. 1642 (1981), at 1646-7.

But the issues which concerned this Court, and which led to the acceptance of the Petition for Writ of Certiorari, revolve upon the rights (or lack of them) of the Respondent Brady. It was his ranch, not that of the other Respondents, which suffered the forceful invasion.

It was primarily his rights which were violated. The issues raised before this Court are peculiar to him and him alone. Under the circumstances, this Court might be well-disposed to decide the issues herein in another case. Better vehicles, such as United States v. Oliver, 686 F.2d 356 (6th Cir. 1982) are available.

Furthermore, Respondents have filed a Motion for Discharge under the Florida Speedy Trial Rule which, if granted, would make all issues raised in this case moot, and would compel dismissal of the Petitioner herein, since a case or controversy would cease to exist. Briefly, Respondents' Arguments on the Motion for Discharge are as follows:

Rule 3.191(a)(1) provides that every person charged with a felony must be brought to trial within 180 days of

arrest. The Respondent Elliott was arrested on May 26, 1978. All other Respondents were arrested on April 22, 1978.

When the Notice of Appeal was filed by the State of Florida on October 2, 1978, the time remaining within the speedy trial period was 51 days as to Elliott, and 27 days as to the other Respondents.

Because the trial court failed to specify a period of days within which the State could proceed to trial after the Mandate was received by the trial court on January 22, 1928 (App. P. 22-23), the State was limited to the balance of the 180 day period. State v. Williams, Fla., 350 So.2d 81 (1977); State v. Jenkins, Fla., 389 So.2d 971 (1980). The State

obtained a second extension of the period on April 12, 1982, but that was beyond the speedy trial period. The period ran on February 17, 1982 for Eckard, List and Manuel, and on March 15, 1982 for Elliott. Thus, the trial court will be compelled to discharge all remaining Respondents.

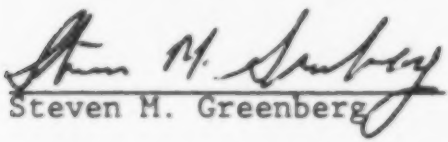
Under the circumstances, Respondents request this Court to deny the petition, or, in the alternative, to dismiss the Respondent Brady, and remand the remainder of the case back to the trial court for a determination of the speedy trial issue.

CONCLUSION

Based upon the foregoing arguments Respondents respectfully requests this Honorable Court to deny jurisdiction over this cause or in the alternative to remand it to the trial court for the position on the Speedy Trial Issue.

Respectfully Submitted,

Steven M. Greenberg
Attorney for Respondents



Steven M. Greenberg

RULE 3.191. SPEEDY TRIAL

(a)(1) Speedy Trial Without Demand. Except as otherwise provided by this Rule, and subject to the limitations imposed under (b)(1) and (b)(2), every person charged with a crime by indictment or information shall without demand be brought to trial within 90 days if the crime charged be a misdemeanor, or within 180 days if the crime charged be a felony, and if not brought to trial within such time shall upon motion timely filed with the court having jurisdiction and served upon the prosecuting attorney be forever discharged from the crime; provided, the court before granting such motion, shall make the required inquiry under (d)(3). The time periods established by this section shall commence

when such person is taken into custody as defined under (a)(4). A person charged with a crime is entitled to benefits of this Rule whether such person is in custody in a jail or correctional institution of this State or a political sub-division thereof or is at liberty on bail or recognizance. This section shall cease to apply whenever a person files a valid demand for speedy trial under (a)(2).

(a)(2) Speedy Trial Upon Demand. Except as otherwise provided by this Rule and subject to the limitations imposed under (b)(1) and (c), every person charged with a crime by indictment or information shall upon demand filed with the court having jurisdiction and upon service of a copy of such demand upon the prosecuting attorney be brought to

trial within 60 days, and if not brought to trial within such period of time following such demand shall upon motion timely filed with the court and served on the prosecuting attorney be forever discharged from the crime; provided, the court before granting such motion shall make the required inquiry under (d)(3). The time period established by this section shall commence when such demand has been properly filed and served. Trial may be scheduled at any time within the 60 day period except that trial may not be scheduled within 5 days of the filing of the demand without the consent of the defendant and the prosecuting attorney.

(a)(3) Commencement of Trial. A person shall be deemed to have been brought to trial if the trial commences

within the time herein provided. The trial is deemed to have commenced when the trial jury panel for the specific trial is sworn for vior dire examination, or, upon waiver of a jury trial, when the trial proceedings begin before the judge.

(a)(4) Custody. For purposes of this Rule, a person is taken into custody, (i) when the person is arrested as a result of the conduct or criminal episode which gave rise to the crime charged, or (ii) when the person is served with a notice to appear in lieu of physical arrest.

(b)(1) Prisoners Outside Jurisdiction. A person who is in federal custody or incarcerated in a jail or correctional institution outside the jurisdiction of this State or a subdivision thereof, and

who is charged with a crime by indictment or information issued or filed under the laws of this State, is not entitled to the benefit of this Rule until that person returns or is returned to the jurisdiction of the court within which the Florida charge is pending and until written notice of this fact is filed with the court and served upon the prosecutor. For such persons, the time period under (a)(1) commences on the date the last act required under this section occurs. For such persons the time period under (a)(2) commences when the demand is filed so long as the acts required under this section occur prior to the filing of the demand. If the acts required under this section do not precede the filing of the demand, then the demand is invalid and shall be stricken upon motion of the prosecuting

attorney. Nothing hereinabove stated shall affect a prisoner's right to speedy trial under section 941.45 941.50, Florida Statutes (1979).

(b)(2) (no title) Where a felony and misdemeanor are consolidated for disposition in circuit court, the misdemeanor shall be governed by the same time period applicable to the felony.

(c) Demand for Speedy Trial; Accused is Bound. A demand for speedy trial binds the accused and the State. No demand for speedy trial shall be filed or served unless the accused has a bona fide desire to obtain trial sooner than otherwise might be provided. A demand for speedy trial shall be deemed a pleading by the accused that he is available for trial, has diligently investigated his case,

and that he is prepared or will be prepared for trial within 5 days. A demand filed by an accused who has not diligently investigated his case or who is not timely prepared for trial shall be stricken as invalid upon motion of the prosecuting attorney. A demand may not be withdrawn by the accused, except on order of the court, with consent of the State or on good cause shown. Good cause for continuances or delay on behalf of the accused shall not thereafter include nonreadiness for trial, except as to matters which may arise after the demand for trial is filed and which could not reasonably have been anticipated by the accused or his counsel. A person who has demanded speedy trial, who thereafter is not prepared for trial, is not entitled to continuance or delay except as provided in this Rule.

(d)(1) Motion for Discharge; Trial; When Timely. A motion for discharge shall be timely if filed and served on or after the expiration of the periods of time for trial provided for herein; however, a motion for discharge filed before expiration of the period of time for trial is invalid and shall be stricken upon motion of the prosecuting attorney.

(d)(2) When Time May Be Extended. The periods of time established by this Rule may be extended provided the period of time sought to be extended has not expired at the time the extension was procured. Such an extension may be procured; (i) upon stipulation, announced to the court or signed in proper person or by counsel, by the party against whom the stipultation is sought to be enforced,

or (ii) by written or recorded order of the court on the court's own motion or motion by either party in exceptional circumstances as hereafter defined in section (f), or (iii) by written or recorded order of the court with good cause shown by the accused, or (iv) by written or recorded order of the court for a peiod of reasonable and necessary delay resulting from proceedings including but not limited to an examination and hearing to determine the mental competency or physical ability of the defendant to stand trial, for hearings on pre-trial motions, for appeals by the State, and for trial or other pending criminal charges against the accused.

(d)(3) Delay and Continuances; Effect on Motion. If trial of the accused

does not commence within the periods of time established by this Rule, a pending motion for discharge shall be granted by the court unless it is shown that (i) a time extension has been ordered under (d)(2) and that extension has not expired, or (ii) the failure to hold trial is attributable to the accused, a co-defendant in the same trial, or their counsel, or (iii) the accused was unavailable for trial under section (e), or (iv) the demand referred to in section (c) is invalid. If the court finds that discharge is not appropriate for reasons under (d)(3)(ii), (iii), or (iv), the pending motion for discharge shall be denied provided however, trial shall be scheduled and commence within 90 days of a written or recorded order of denial.

(e) Availability for Trial. A person is unavailable for trial if (1) the person or his counsel fails to attend a proceeding where their presence is required by these Rules, or (2) the person or his counsel is not ready for trial on the date trial is scheduled. A person who has not been available for trial during the term provided for herein is not entitled to be discharged. No presumption of non-availability attaches, but if the State objects to discharge and presents any evidence tending to show non-availability, the accused then must by competent proof establish availability during the term.

(f) Exceptional Circumstances. As permitted by (d)(2) of this Rule, the court may order an extension of the time periods provided under this Rule where

exceptional circumstances are shown to exist. Exceptional circumstances shall not include general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses, or other avoidable or foreseeable delays.

Exceptional circumstances are those which as a matter of substantial justice to the accused or the State or both require an order by the court. Such circumstances include (1) unexpected illness or unexpected incapacity or unforeseeable and unavoidable absence of a person whose presence or testimony is uniquely necessary for a full and adequate trial; (2) a showing by the State that the case is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise,

that it is unreasonable to expect adequate investigation or preparation within the periods of time established by this Rule; (3) a showing by the State that specific evidence or testimony is not available at a later time; (4) a showing by the accused or the State of necessity for delay grounded on developments which could not have been anticipated and which will materially affect the trial; (5) a showing that a delay is necessary to accommodate a co-defendant, where there is reason not to sever the cases in order to proceed promptly with trial of the defendant; (6) a showing by the State that the accused has caused major delay or disruption of preparation of proceedings, as by preventing the attendance of witnesses or otherwise.

(g) Effect of Mistrial; Appeal; Order of New Trial. A person who is to be tried again or whose trial has been delayed by an appeal by the State or the defendant shall be brought to trial within 90 days from the date of declaration of a mistrial by the trial court, the date of an order by the trial court granting a new trial, the date of an order by the trial court granting a motion in arrest of judgment, or the date of receipt by the trial court of a mandate, order, or notice of whatever form from an appellate or other reviewing court which makes possible a new trial for the defendant, which is last in time.

(h)(1) Discharge from Crime; Effect. Discharge from a crime under this Rule shall operate to bar prosecution of the

crime charged and of all other crimes upon which trial has not commenced nor conviction obtained nor adjudication withheld and which were or might have been charged as a result of the same conduct or criminal episode as a lesser degree or lesser included offense.

(h)(2) Nolle Prosequi; Effect. The intent and effect of this Rule shall not be avoided by the State by entering a nolle prosequi to a crime charged and by prosecuting a new crime grounded on the same conduct or criminal episode whether or not the pending charge is suspended, continued, or is the subject of entry of a nolle prosequi.

APPENDIX

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JANUARY 26, 1982

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 59,054

FRANK J. BRADY, et al,

Respondents.

Petitioner's Motion for Stay of Mandate in the above styled cause is denied.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C., 20543

February 24, 1982

Robert L. Bogen, Esq.
Assistant Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida 32301

RE: State of Florida v. Frank J. Brady, et al.
A-720

Dear Mr. Bogen:

Your application for stay in the above-entitled case has been presented to Justice Powell, who has endorsed thereon the following:

"Denied
L.F.P.
2/24/82"

Very truly yours,

ALEXANDER L. STEVAS,
Clerk

BY

Katherine A. Downs
Assistant Clerk

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C., 20543

March 22, 1982

Robert L. Bogen, Esq.
Assistant Attorney General
The Capitol
Tallahassee, Florida 32301

RE: Florida v. Frank J. Brady, et al., No. 81-1636
A-720

Dear Mr. Bogen:

The Court today entered the following order in the above-entitled case:

"The application for stay addressed to Justice Rehnquist and referred to Court is denied."

Very truly yours,

ALEXANDER L. STEVAS,
Clerk

BY

Francis J. Lorson
Chief Deputy Clerk

IN THE CIRCUIT COURT OF
THE NINETEENTH JUDICIAL
CIRCUIT IN AND FOR MARTIN
COUNTY STATE OF FLORIDA

CASE NOS. 78-175-CF
78-172-CF
78-235-CF
78-254-CF

STATE OF FLORIDA,

Plaintiff,

vs.

PHILIP M. ECKARD,
RONALD B. ELLIOT,
ROBERT GUILSANO,
DAVID A. LIST,
HERMOGENES MANUEL,

Defendants.

ORDER

THIS CAUSE coming on to be heard on State's Motion for Extension of Speedy Trial and the Court having heard argument of counsel and being otherwise informed in the premises, it is hereby;

ORDERED AND ADJUDGED that Speedy Trial in the above styled cases is extended to a date 60 days after the United States Supreme Court either denies the State's Petition for Writ of Certiorari or, if it accepts Certiorari, 60 days after the Martin County Clerk of Court receives it's Opinion.

DONE AND ORDERED in Stuart, Martin County, Florida on this 12th day of April, 1982.

C. PFEIFFER TROWBRIDGE
Circuit Judge

IN THE CIRCUIT COURT IN
AND FOR MARTIN COUNTY
STATE OF FLORIDA

CASE NO. 78-171-CF

STATE OF FLORIDA,

Plaintiff,

vs.

FRANK J. BRADY,

Defendant.

NOLLE PROSEQUIE

COMES NOW, the State of Florida by and through its undersigned Assistant State Attorney, FRANK J. LYNCH, JR., and files this its NOLLE PROSEQUIE in the above styled case wherein the above named Defendant is charged with:

CT. I - DELIVERY OF CONTROLLED SUBSTANCE
CT. II - IMPORTATION OF CONTROLLED SUBSTANCE
CT. III - CONSPIRACY TO COMMIT FELONY
CT. IV - POSSESSION OF CONTROLLED SUBSTANCE

DATED: this 23rd day of April, 1982.

Respectfully submitted:
ROBERT E. STONE
State Attorney

BY: _____
FRANK J. LYNCH, JR.
Assistant State Attorney
Stuart, Florida 33495

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that such further proceedings be had in said cause in accordance with the opinion of this Court attached hereto and incorporated as part of this order, and with the rules of procedure and laws of the State of Florida.

WITNESS the Honorable Gavin K. Letts, Chief Judge of the District Court of Appeal of the State of Florida, Fourth District, and the seal of the said Court at West Palm Beach, Florida on this day.

Date: January 21, 1982

Case No.: 78-2121 & 78-2771

County of Origin: Martin

T.C. Case #: 78-171; 235; 254 CF

Style: State v. Frank J. Brady

Clerk of the District
Court of Appeal of the
State of Florida,
Fourth District

IN THE CIRCUIT COURT OF
THE NINETEENTH JUDICIAL
CIRCUIT IN AND FOR MARTIN
COUNTY, STATE OF FLORIDA

CASE NOS. 78-171; 235;
254-CF

STATE OF FLORIDA,

Plaintiff, Appellant,

vs.

FRANK J. BRADY; PHILIP M.
ECKARD; RONALD B. ELLIOTT;
DAVID A. LIST: HERMOGENES
MANUEL,

Defendants, Appellees.

ORDER

THIS CAUSE having come on to be heard on the State of Florida's Motion for Extension of Speedy Trial, and the Court being advised in the premises, it is

ORDERED AND ADJUDGED that speedy trial in this cause is tolled on October 3, 1979, granting Defendants'

Motion to Suppress, until appeal is finally determined.

DONE AND ORDERED in Stuart, Martin County, Florida this 13th day of October, 1978.

_____
CIRCUIT COURT JUDGE

Reply Brief

Office-Supreme Court, U.S.
FILED
DEC 23 1982

CASE NO. 81-1636

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1982

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, PHILIP M. ECKARD, RONALD B. ELLIOT, DAVID A. LIST, and HERMOGENES MANUEL,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY TO RESPONDENTS' MEMORANDUM OF LAW ON STATUS OF RESPONDENTS

JIM SMITH
Attorney General
Tallahassee, FL 32304

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

QUESTION PRESENTED

WHETHER FLORIDA'S SPEEDY TRIAL RULE PRECLUDES A FUTURE PROSECUTION OF ANY OF THE FIVE PARTY RESPONDENTS?

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ARGUMENT

FLORIDA'S SPEEDY TRIAL RULE DOES NOT PRECLUDE A FUTURE PROSECUTION OF ANY OF THE FIVE PARTY RESPONDENTS.

As is appropriate under the circumstances of the instant case, both Petitioner and Respondents, in the Supplemental Memoranda of Law, have discussed the status of Respondent Brady separately from the discussion of the status of the other four party Respondents. It seems that all parties are in agreement that, as a result of Florida's nolle prosequie of Respondent Brady on April 23, 1982, Respondent Brady is not subject to prosecution with reference to the instant criminal charges. There presently exists no pending prosecution against Respondent Brady in the State of Florida. Of

course, this Court was informed of this fact in a timely fashion on page 16 of the Response to Petition for Writ of Certiorari filed by Respondents on May 7, 1982. Thus, this Court was aware of the above status of Respondent Brady when this Court granted the Petition for Writ of Certiorari on May 24, 1982.

However, the above situation does not exist with reference to the other four co-Respondents. Those co-Respondents were not the beneficiaries of a nolle prosequie. Consequently, the State charges against them are still pending, and these co-Respondents are most definitely subject to prosecution.

At this point, Respondents have

attempted to embroil this Court in a litigation of Florida's speedy trial rule. Petitioner does not believe that this Court is interested in litigating, before this Court, the applicability of various and sundry provisions of Florida's speedy trial rule to the various party Respondents, anymore than this Court might be interested in litigating, in this case, any other possible impediment which may subvert a future prosecution following the conclusion of the instant certiorari proceedings. The fact remains that Respondent Brady has no pending charges against him, and the other four co-Respondents do have pending charges against them. Put plain and simply, that is the

present status of the prosecution in Florida of the five party Respondents.

Nonetheless, in their Memorandum of Law on Status of Respondents, Respondents attempt to litigate before this Court matters concerning the applicability of the state speedy trial rule to a future prosecution of each of the five Respondents. With reference to Respondent Brady, while he is not presently subject to prosecution, charges could be re-filed against him. Early on, during the initial stages of the instant appellate proceeding, when Florida filed its Notice of Appeal to the Fourth District Court of Appeal of the State of Florida, the state court trial judge

"ordered and adjudged that speedy trial in this cause is tolled from the entry of the Notice of Appeal of this Court's order, rendered on October 2, 1978, granting defendants' Motion to Suppress, until that appeal is finally determined." (See appendix, pages 1-2). Since the state court trial judge tolled the speedy trial time until the appeal was finally determined, and Respondents have conceded that a number of weeks were left within which to try them when that order tolling the time was entered, then it becomes clear that the issue devolves into the question of when the appeal is finally determined. This is the real issue on the speedy trial question, for that was the

explicit wording of the trial court order. Parenthetically, the state speedy trial rule which Respondents have attached as an appendix to their Memorandum of Law on Status of Respondents is not the applicable speedy trial rule. That is an amended speedy trial rule, which was not in effect at the time of the operative event in this case (the state trial court order tolling the speedy trial time). See, State v. Jenkins, 389 So.2d 971 (Fla. 1980), footnote 1; Holmes v. Leffler, 411 So.2d 889 (Fla. 5DCA 1982). The speedy trial rule that was in effect at the time of this operative event is fully explicated by the Florida Supreme Court in Jenkins,

supra. In that case, the Florida Supreme Court has said that the language of the trial court order controls how long the speedy trial time is tolled for.

Has the original appeal which predicated the initial order of the state trial court judge tolling the speedy trial time been "finally determined?" The answer is no. It is still being litigated, currently in this Court. The certiorari proceedings before this Court, as well as the previous Florida Supreme Court certiorari proceedings, are a continuation of the initial appeal, and constitute a continuation of the litigation with reference to that original appeal. The certiorari

proceedings in the Florida Supreme Court and the United States Supreme Court, in the present context, are not new original collateral actions in and of themselves. Reno v. Baker, 364 So.2d 538 (Fla. 3DCA 1978), supports this analysis, wherein it is implied in the text under headnote 3 that further appellate review sought in the United States Supreme Court, contrary to seeking collateral relief by way of Writ of Habeas Corpus, is a continuance of the original appellate proceeding. (By contrast, an application for habeas corpus is itself an original proceeding, rather than a continuation of an original proceeding.) Further, in Atlantic Coast Line Railroad Company v. Brotherhood of

Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), it is clearly implied from language at 398 U.S. 286, 287, 296, that the United States Supreme Court has potential appellate jurisdiction over federal questions raised in state court proceedings, as in the case sub judice. Thus, it is evident that the certiorari proceedings presently before this Court are nothing but a continuation of the original appellate action that commenced with the filing of the Notice of Appeal in the Fourth District Court of Appeal. Thus, the appeal which predicated the original tolling of the speedy trial time has not yet been finally determined and, therefore, the remainder of the speedy trial time has not yet begun

to run.

The same analysis holds true with reference to the other four party Respondents. The original order tolling the speedy trial time was applicable to them as well. Inasmuch as the original appellate action, with reference to the other four party Respondents, is still in progress, and has not yet been finally determined, the remainder of the speedy trial time has not yet begun to run for them either. (However, the State has not entered a nolle prosequie against the other four party Respondents as it has done against Respondent Brady).

In short, the original order tolling the speedy trial time "until

that appeal is finally determined," it still an effective order. The "appeal" has not yet been finally determined. It does not become finally determined until this Court finally renders its decision. While it is true that during the pendency of the Petition for Writ of Certiorari filed before this Court, the State sought a second speedy trial extension order (see page 25 of Supplemental Memorandum on "Case or Controversy" for copy of this order), this more recent speedy trial extension order does not render the original speedy trial extension order a nullity, it merely supersedes it.

In short, the basic flaws which are reflected in Respondents'

Memorandum of Law on Status of Respondents are that (1) with reference to Respondent Brady, Respondents have applied the wrong speedy trial rule and, in applying the correct speedy trial rule, the explicit wording of the original extension of speedy trial order must be given effect; and (2) with reference to the other four party Respondents, Respondents have applied the correct speedy trial rule, but have incorrectly characterized the original speedy trial extension order as being silent as to how long the extension was for. In fact, the original extension order was not silent in this regard. It specified that the time would be tolled until the appeal is finally determined.

Under these circumstances, it is evident that none of the Respondents are entitled to a speedy trial discharge from subsequent prosecution. Certainly, this Court should not allow itself to be placed in the position of litigating the applicability of the appropriate state speedy trial rule. Unless and until any of the Respondents obtain such a discharge (and an affirmance on appeal), the issue of the applicability of the state's speedy trial rules should have no bearing upon whether or not a case or controversy exists in this Court.

CONCLUSION

Based upon the foregoing arguments, and the arguments presented in Petitioner's Supplemental Memorandum on "Case or Controversy," as well as those presented in Petitioner's Initial Brief, supported by the circumstances and authorities cited, Petitioner respectfully requests that this Honorable Court continue jurisdiction over this cause and reverse the decision of the Supreme Court of Florida.

Respectfully submitted,

JIM SMITH
Attorney General

ROBERT L. BOGEN
Assistant Attorney General

APPENDIX

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY, STATE OF FLORIDA

CASE NOS. 78-171; 235; 254-CF

STATE OF FLORIDA

Plaintiff, Appellant

-vs-

FRANK J. BRADY; PHILIP M. ECKARD; RONALD B. ELLIOT; DAVID A. LIST; HERMOGENES MANUEL

Defendants, Appellees

ORDER

THIS CAUSE having come on to be heard on the State of Florida's Motion for Extension of Speedy Trial, and the Court being advised in the premises, it is

ORDERED AND ADJUDGED that speedy

trial in this cause is tolled from the entry of the Notice of Appeal of this Court's order, rendered on Oct. 2, 1978, granting Defendants' Motion to Suppress, until that appeal is finally determined.

DONE AND ORDERED in Stuart, Martin County, Florida, this 13th day of October, 1978.

/s/ C. Pfeiffer Trowbridge
CIRCUIT JUDGE

Supplemental Reply Brief

Office-Supreme Court, U.S.
FILED
FEB 14 1983
ALEXANDER L. STEVAS,
CLERK

CASE NO. 81-1636

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1982

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, PHILIP M. ECKARD, RONALD B. ELLIOT, DAVID A. LIST, and HERMOGENES MANUEL,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

PETITIONER'S SUPPLEMENTAL REPLY TO RESPONDENTS' MEMORANDUM OF LAW ON STATUS OF RESPONDENTS

JIM SMITH
Attorney General
Tallahassee, FL 32304

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

QUESTION PRESENTED

WHETHER FLORIDA'S SPEEDY TRIAL RULE PRECLUDES A FUTURE PROSECUTION OF ANY OF THE FIVE PARTY RESPONDENTS?

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ARGUMENT

FLORIDA'S SPEEDY TRIAL RULE DOES NOT PRECLUDE A FUTURE PROSECUTION OF ANY OF THE FIVE PARTY RESPONDENTS.

Pursuant to Orders of this Court dated November 8, 1982, and December 8, 1982, this Court removed the instant case from the oral argument calendar, and required supplemental briefs addressing the present posture of the cases against each Respondent. Petitioner filed an initial supplemental brief. Respondent filed an answer supplemental brief. Petitioner filed a reply to Respondents' answer.

In Respondents' answer supplemental brief, Respondents charged that the State of Florida would not be able to prosecute Respondents

because Respondents were entitled to a speedy trial discharge under Fla. R. Crim. P. 3.191. Respondents noted that such a motion for discharge was pending before the state trial court. Petitioner answered in its reply supplemental brief that Florida's speedy trial rule would not constitute an impediment to a prosecution of Respondents on the instant charges. Petitioner set forth its reasons for this conclusion.

Now, the motion for discharge has been heard by the state court trial judge, and it was denied. A conformed copy of the Order denying the motion for discharge is attached as an appendix to this brief. Consequently, any Florida speedy

trial rule issue which Respondents are attempting to raise before this Court has not been accepted by the Florida courts in their determination of the applicability of this state rule of procedure, and therefore should not be considered by this Court.

CONCLUSION

Based upon the foregoing, and the arguments presented in Petitioner's initial and reply briefs, as well as those presented in Petitioner's initial brief on the merits, Petitioner respectfully requests that this Honorable Court continue jurisdiction over this cause and reverse the decision of the Supreme Court of Florida presently under review.

Respectfully submitted,

JIM SMITH
Attorney General

ROBERT L. BOGEN
Assistant Attorney General

APPENDIX

APPENDIX

IN THE CIRCUIT COURT
OF THE NINETEENTH
JUDICIAL CIRCUIT
IN AND FOR MARTIN
COUNTY, STATE OF
FLORIDA

CASE NOS. 78-175-CF
78-235-CF
78-172-CF
78-254-CF

STATE OF FLORIDA,

Plaintiff

vs.

PHILIP M. ECKARD
RONALD B. ELLIOT
DAVID A. LIST
HERMOGENES MANUEL,

Defendants

ORDER

THIS CAUSE coming on to be heard on the Defendants' Motion to Discharge, the Court having heard argument of

counsel and being otherwise fully advised in the premises, the Court finds as follows:

1. On October 13, 1978 this Court entered its Order tolling speedy trial in this cause until the State's appeal on the Motion to Suppress was "finally determined."

2. The State took a direct appeal of the issue through the District Court of Appeals, the Florida Supreme Court and petitioned for certiorari to the United States Supreme Court.

3. On April 12, 1982 this Court granted a further extension of speedy trial pending the decision of the United States Supreme Court.

4. The United States Supreme

Court accepted certiorari and the issue is currently pending before them at this time.

5. Neither of the Orders tolling or extending speedy trial have been reversed by any appellate court.

IT IS THEREFORE,

ORDERED AND ADJUDGED that the direct appeal by the State of Florida on the Motion to Suppress in this cause will not be "finally determined" until the United States Supreme Court renders its decision and therefore the Defendants' Motion to Discharge is hereby denied.

DONE AND ORDERED this 1st day of February, 1983, in Stuart, Martin County, Florida.

/s/ C. Pfeiffer Trowbridge
CHIEF JUDGE

Amicus Brief

1

Supreme Court, U.S.
FILED
JAN 5 1983
ALEXANDER L. STEVAS
CLERK

No. 81-1636

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

STATE OF FLORIDA,
Petitioner,

vs.

FRANK J. BRADY, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

MOTION OF CALIFORNIA FARM BUREAU FEDERATION AND FLORIDA FARM BUREAU FEDERATION FOR LEAVE TO FILE BRIEF AMICI CURIAE, AND BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS

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No. 81-1636

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

STATE OF FLORIDA,
Petitioner,
vs.
FRANK J. BRADY, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

MOTION OF CALIFORNIA FARM BUREAU FEDERATION AND FLORIDA FARM BUREAU FEDERATION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS

California Farm Bureau Federation and Florida Farm Bureau Federation respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of Respondents' position in this case.

INTEREST OF CALIFORNIA FARM BUREAU FEDERATION AND FLORIDA FARM BUREAU FEDERATION

California Farm Bureau Federation is a voluntary, non-governmental, non-profit California corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of California. Its members consist of 52 county Farm Bureaus with a combined membership at the close of its 1982 membership year of over 99,000 families. Over 85% of all commercial farmers in the State of California are members of county Farm Bureaus.

Florida Farm Bureau Federation is a voluntary, non-governmental, non-profit Florida corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of Florida. Its members consist of 64 county Farm Bureaus with a combined membership of over 95,000 families. Over 90% of all commercial farmers in the State of Florida are members of county Farm Bureaus.

California Farm Bureau Federation and Florida Farm Bureau Federation seek this Court's permission to express their views in this case because this Court's disposition herein of the question regarding the scope of the "open fields" doctrine will affect the privacy rights and day-to-day operations of a substantial portion of the membership of their member county Farm Bureaus.

SUBSTANCE OF THE BRIEF AMICI CURIAE

The accompanying brief *amici curiae* discusses an ongoing problem faced by hundreds and perhaps thousands of agricultural employers in this country.

For years, officers of the United States Border Patrol have relied on the "open fields" doctrine to enter agricultural fields at will in search of undocumented workers. Agricultural employers who are not also statutorially-defined farm labor contractors are not subject to prosecution under federal law for merely employing undocumented workers; nevertheless, the privacy and property rights of these employers are infringed routinely by immigration officers who regard agricultural fields as though the fields were open to the public.

The accompanying brief *amici curiae* argues that the "open fields" doctrine, as modified by this Court's opinion

in *Katz v. United States,* 389 U.S. 347, 19 L.Ed.2d 685, 89 S.Ct. 2034 (1967) and as interpreted by this Court in *Air Pollution Variance Board v. Western Alfalfa,* 416 U.S. 861, 40 L.Ed.2d 607, 94 S.Ct. 2114 (1973), does not authorize immigration officers to enter the fields of a farmer or rancher who has taken reasonable steps to exclude the public therefrom, unless the officers first obtain valid consent or a search warrant, or have probable cause to believe that undocumented aliens are present in the fields, coupled with exigent circumstances justifying an immediate entry.

REASONS FOR GRANTING THIS MOTION

The factual circumstances of the case at bar involve the efforts of the State of Florida to prosecute a suspected smuggler of contraband. However, the Court's disposition of this case will impact not only the parties to this case or parties to future cases involving similar facts.

Rather, this Court's determination as to the scope and applicability of the "open fields" doctrine will affect the privacy rights of all law-abiding farmers and ranchers throughout the nation and their right to conduct their businesses without unwarranted governmental intrusion or interruption. Specifically, the outcome of this case will bear on the U.S. Border Patrol practice of entering agricultural fields at will.

California Farm Bureau Federation and Florida Farm Bureau Federation have only recently learned of the Court's order of November 8, 1982, postponing in the case at bar the oral argument previously scheduled for December 8, 1982. Because the impact of the Court's opinion in this case will possibly extend far beyond that of other cases of this type, the interests of justice will be better

served if the Court considers the additional viewpoint expressed in the accompanying brief. California Farm Bureau Federation and Florida Farm Bureau Federation trust that by being apprised of the background of the U.S. Border Patrol practice of entering agricultural fields at will and the impact which the Court's opinion in the case at bar will have on that practice, the Court will be better enabled to render a comprehensive interpretation of the scope of the "open fields" doctrine and clear guidelines as to what does and does not constitute an "open field."

WHEREFORE, California Farm Bureau Federation and Florida Farm Bureau Federation respectfully move this Court for leave to file the accompanying brief *amici curiae*.

Respectfully submitted,

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By

THOMAS F. OLSON

No. 81-1636

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

STATE OF FLORIDA,
Petitioner,

vs.

FRANK J. BRADY, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF AMICI CURIAE CALIFORNIA FARM BUREAU FEDERATION AND FLORIDA FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENTS

California Farm Bureau Federation and Florida Farm Bureau Federation respectfully submit this brief in support of Respondents' position.

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

A statement describing California Farm Bureau Federation and Florida Farm Bureau Federation and their interest in this case is set forth in the preceding motion requesting leave to file this brief *amici curiae*. Likewise, a summary of the following argument is set forth in the preceding motion under the heading "Substance of the Brief *Amici Curiae*."

ARGUMENT

I

THE "OPEN FIELDS" EXCEPTION TO THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION SHOULD NOT APPLY TO AREAS FROM WHICH THE PUBLIC IS EXCLUDED

In *Hester v. United States*, 265 U.S. 57, 68 L.Ed.2d 898, 44 S.Ct. 445 (1924) this Court first enunciated the so-called "open fields" doctrine. *Hester* held that the protections accorded by the Fourth Amendment to the United States Constitution do not extend to "open fields."

At the time it was rendered and for some 43 years thereafter, the holding in *Hester* was consonant with the then-existing principle that common-law property concepts control Fourth Amendment analysis. However, with this Court's opinion in *Katz v. United States*, 389 U.S. 347, 351, 361, 19 L.Ed.2d 685, 89 S.Ct. 2034 (1967) that the Fourth Amendment protects "people, not places" and protects an individual from governmental intrusion when he exhibits an actual and reasonable expectation of privacy, common-law property concepts no longer ultimately determine whether or not Fourth Amendment protections apply to particular types of governmental intrusions.

Despite the effect of *Katz* on Fourth Amendment analysis, the United States Border Patrol—an arm of the United States Immigration and Naturalization Service—has continued to rely on the "open fields" doctrine and other common-law property concepts as a carte blanche for entering agricultural fields at will. Indeed, the current policy of the immigration authorities which regards agricultural fields and other areas beyond the curtilage of a

dwelling as unprotected by the Fourth Amendment is memorialized in the following excerpt from page 24 of a field operations manual entitled *The Law of Search and Seizure for Immigration Officers* (U.S. Department of Justice Publication M-69, revised December 20, 1979):

> The lawfulness of the search or seizure depends on whether or not it is reasonable under the Fourth Amendment to the Constitution, i.e. whether or not a warrant is required, and, if so, whether the warrant is valid and a proper search is made pursuant to the warrant.
>
> . . .
>
> . . . There is, however, considerable case law holding that the Fourth Amendment does not apply to entry onto so-called "open fields" . . . . The term "open fields" has been construed as applicable to private lands, *not* including dwellings, which are beyond the curtilage (an area of domestic use immediately surrounding a dwelling and usually, but not always, fenced in with the dwelling).

The immigration authorities argue that because agricultural lands are beyond the curtilage of a dwelling, they are "open fields" and beyond the scope of protection of the Fourth Amendment. Therefore, Border Patrol agents need to obtain neither consent nor a search warrant in order to enter agricultural lands; nor do they need to have "probable cause" that some criminal activity is occurring thereon coupled with "exigent circumstances" prior to making such entry. While this simplistic approach to Fourth Amendment issues may make it easy for immigration officers to decide whether or not Constitutional protections extend to a particular area, the approach is contrary to proper Fourth Amendment analysis since *Katz*.

Katz and its progeny shifted the focus of judicial inquiry regarding Fourth Amendment issues from one relying solely on common-law property concepts to one relying on the "reasonable expectation of privacy" doctrine. While it is true that Fourth Amendment analysis continues to rely to a great extent on the nature of the property where a search occurred, the nature of the property in question is now a guiding, rather than controlling, factor. *Katz*, in other words, modified previous Fourth Amendment analysis by requiring courts to examine the characteristics of the property where a search occurred in conjunction with the "reasonable expectation of privacy" doctrine.

Indeed, "reasonable expectation of privacy" must now be regarded as the controlling factor in Fourth Amendment analysis. For example, in *Air Pollution Variance Board v. Western Alfalfa*, 416 U.S. 861, 40 L.Ed.2d 607, 94 S.Ct. 2114 (1973), this Court recognized the continuing existence of the "open fields" exception to the Fourth Amendment; nevertheless, in applying the "open fields" exception, the *Western Alfalfa* court recognized that the exception must be applied in light of *Katz*.

In *Western Alfalfa*, a state health inspector had entered defendant-corporation's outdoor premises in the daylight, without its knowledge or consent and without a warrant, to make an opacity test of smoke being emitted from the plant chimney. This Court at 416 U.S. 864, 865 stated:

> The field inspector did not enter the plant or offices. He was not inspecting stacks, boilers, scrubbers, flues, grates, or furnaces; nor was his inspection related to respondent's files or papers. He had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke. The Court in *Hester v. United States* [citation] . . . refused to extend the

> Fourth Amendment to sights seen in the "open fields." The field inspector was on respondent's property *but we are not advised that he was on premises from which the public was excluded.* Under the Noise Control Act of 1972 [citation] an inspector may enter a railroad right-of-way to determine whether noise standards are being violated. *The invasion of privacy* in either that case or the present one, if it can be said to exist, is abstract and theoretical. . . . Depending upon the layout of the plant, the inspector may operate within or without the premises but in either case he is *well within the "open fields" exception to the Fourth Amendment approved in Hester.*

(Emphasis added.) While the last sentence of the above quotation indicates that the "open fields" doctrine continues to exist as an exception to the Fourth Amendment, the phrases "invasion of privacy" and ". . . we are not advised that he was on premises from which the public was excluded" indicate that the "open fields" doctrine has been modified by the "reasonable expectation of privacy" doctrine of *Katz*. Thus, under *Katz* and *Western Alfalfa*, it is the degree of public exclusion exercised by the party asserting his Fourth Amendment rights which is the critical factor in determining the "openness" of a field.

In fact, public exclusion from property may be viewed as the feature which harmonizes the "reasonable expectation of privacy" and "open fields" rules. For example, where an individual takes the types of steps which respondent Brady took to close his fields from public entry, the "open fields" doctrine should not apply; by closing his fields, the individual expects them to remain private and free from unwarranted intrusion. On the other hand,

where an individual does nothing to close his lands from public intrusion, he cannot later claim that he had exhibited a subjective expectation of privacy therein; in that situation, the application of the "open fields" doctrine would be proper.

Lower courts have recognized the effect of *Katz* on *Hester*:

> . . . In *Katz v. United States* [citation] the court held that the Fourth Amendment protects people, not "places." Ever since that decision, the determination of whether an intrusion is an unreasonable search has depended on one's actual subjective expectation of privacy and whether that expectation is objectively reasonable. See [citation]. Thus, the focus is no longer on common law property concepts. See *Wattenburg v. United States,* 388 F.2d 853, 857 (9 Cir. 1968). It now appears that *Hester* no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy. *United States v. Magana,* 512 F.2d 1169, 1170 (9 Cir. 1975); *Patler v. Slayton,* 503 F.2d 472, 478 (4 Cir. 1974).

United States v. Freie, 545 F.2d 1217, 1223 (9 Cir. 1976), cert. den. 430 U.S. 966. See also *United States v. Basile,* 569 F.2d 1053, 1056 (9 Cir. 1978), cert. den. 436 U.S. 920, 56 L.Ed.2d 761, 98 S.Ct. 2268.

Further recognition of the effect of *Katz* on *Hester* is demonstrated by the following excerpt:

> Under *Hester v. United States* [citation] Perez had no Fourth Amendment protection in his backyard. However, that holding is clearly modified by the reasonable expectation of privacy doctrine of *Katz v. United States* [citation].

United States v. Perez, 440 F.Supp. 272, 287 [fn. 43] (U.S.D.C., N.D. Ohio 1977), aff. 571 F.2d 584 (6th Cir. 1978), cert. den. 435 U.S. 998, 56 L.Ed.2d 88, 98 S.Ct. 1652 (1978).

In the opinion of *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation, the result of these decisions is a severe reduction of the importance of common-law property concepts in Fourth Amendment analysis. The concept of curtilage, for example, no longer has any independent meaning but merely describes an area in which one traditionally might expect privacy.

As a result of the modification of the *Hester* "open fields" exception by the *Katz* "reasonable expectation of privacy" doctrine, courts recognize that even ". . . 'open fields' may, in certain cases, be protected by the Fourth Amendment." *U.S. v. DeBacker,* 493 F.Supp. 1078, 1079 (U.S.D.C., W.D. Mich., N.D. 1980). At 493 F.Supp. 1081, the *DeBacker* court explains its reasoning for this proposition:

> . . . a reading of the Fourth Amendment [that under *Katz,* "open fields" are outside Fourth Amendment protection because no reasonable expectation of privacy exists in such places] would provide police with a carte blanche to investigate areas outside of a homestead's curtilage. . . .
>
> I am convinced that *Katz* compels a more sensitive reading of the Fourth Amendment. [Citation.] Instead of declaring entire areas as outside of Fourth Amendment protection, I believe *Katz* compels an analysis of the particular type of surveillance, and its effect on the privacy and security of citizens. [Citation.] As Justice Harlan discussed in his dissenting opinion in *United States v. White,* 401 U.S. 745, 786, 91 S.Ct.

1122, 1143, 28 L.Ed.2d 453 (1971), Fourth Amendment analysis requires "assessing the nature of the particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." The ultimate question, therefore, is not whether the surveillance in this case occurred in "open fields". Instead, the issue is whether "if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." [Citation.]

II

THE INABILITY TO OBSERVE THE ILLEGAL NATURE OF THE OBJECT OF A SEARCH PRIOR TO ENTERING AN AREA CLOSED TO THE PUBLIC SHOULD RENDER INAPPLICABLE THE "OPEN FIELDS" EXCEPTION

The above-quoted language by the *DeBacker* court is especially appropriate when considering the applicability of the "open fields" doctrine to searches for undocumented workers upon agricultural lands. The nature of Border Patrol searches for undocumented workers upon agricultural lands is generally vastly different from the situations usually dealt with by courts when they have considered Fourth Amendment questions involving "open fields." Ironically, from a legal standpoint, the factual circumstances of the case at bar are more similar to a typical Border Patrol search on agricultural lands than they are to the majority of cases involving the issue of the "open fields" doctrine. [E.g. see *Burkholder v. Superior Court*, 96 Cal.App.3d 421, 158 Cal.Rptr. 86 (1st D.C.A., Cal. 1979).]

The difference involves the nature of the object of the search. Most cases dealing with the question of the existence of a reasonable expectation of privacy in "open fields" have involved a search for an object whose illegal nature is apparent by mere observation of the object from a vantage point outside the area in question. For example, aerial surveillance of a field from an aircraft flying at legal altitudes may result in the discovery of plant growth which appears to be marijuana. The illegal nature of the object of such aerial surveillance is apparent from visual observation of the object alone, and such observation would provide probable cause that criminal activity is occurring on the land in question.

Another example would be that of the situation which the Court faced in *Air Pollution Variance Board v. Western Alfalfa, supra.* As this Court noted there, the inspector "had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke." Again, the illegal nature of the substance in question (i.e., the smoke) was apparent by mere observation from afar.

Immigration searches, on the other hand, are a different matter. In the typical search for undocumented workers upon agricultural lands, Border Patrol agents locate, either by aerial or ground surveillance, a group of workers. The agents thereupon enter the agricultural fields, approach the workers, and question them as to their legal right to be in the United States. It is as a result of this questioning that the agent determines whether or not there is probable cause to believe that a particular worker is in violation of immigration laws. From a legal stand-

point, this situation is analogous to that of the case at bar, wherein the sheriff's deputies did not discover any illegal activity until after they had entered Respondent Brady's ranch and secreted themselves to await the arrival of the aircraft, whereupon they ultimately discovered the aircraft contained marijuana.

An indiscriminate search for undocumented workers results in a significantly greater intrusion into the privacy and freedom of the grower on whose lands the search occurs than does an observation of an object or substance whose illegal nature is apparent from the observation itself. The very nature of the former type of search requires the Border Patrol agents to enter upon agricultural lands only when workers are present thereon. Such searches severely disrupt the work being performed by the farmworkers, whether or not there are undocumented workers present. Many times these searches occur when critical work must be performed as quickly as possible, resulting in substantial production losses due to the disruption of tight production schedules.

Moreover, growers have reported numerous instances of property damage caused by hasty and careless Border Patrol entries onto their fields. Such damage may include the destruction of crops, crop supportive structures, fences, gates, and unpaved avenues. Even more frightening are reports of situations where growers, workers, or their childen have been injured or have narrowly escaped injury during this type of search operation.

Before causing such disruption and damage, the Border Patrol agents should have probable cause to believe that specific named illegal aliens are present upon private agricultural lands they intend to search and, in the absence

of valid consent or exigent circumstances, should be required to procure a search warrant from a neutral magistrate based on such probable cause.

III

GROWERS SHOULD BE ENTITLED TO THE PROTECTIONS OF THE FOURTH AMENDMENT IN THEIR "FACTORIES WITHOUT WALLS"

The notion that a grower is entitled to the protections of the Fourth Amendment is strongly supported by case law regarding the applicability of those protections to other business operations. It is well-settled that the Fourth Amendment protects business operators against unreasonable searches and seizures. Unless they first have valid consent given by one lawfully entitled to give such consent or probable cause that criminal activity is occurring coupled with exigent circumstances, law enforcement officers may not enter commercial premises from which the public is excluded unless they have obtained a valid search warrant.

The Fourth Amendment protects not only private homes (*Weeks v. United States*, 232 U.S. 383, 390-394, 58 L.Ed. 652, 34 S.Ct. 341 (1913)), but extends to ". . . the portions of commercial premises which are not open to the public. . . ." *See v. City of Seattle*, 387 U.S. 541, 545, 18 L.Ed.2d 943, 87 S.Ct. 1737 (1966).

> . . . The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

See v. City of Seattle, supra at 543; *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312, 56 L.Ed.2d 305, 98 S.Ct. 1816 (1978).

The immigration authorities themselves recognize that a businessman is entitled to the protections of the Fourth Amendment in areas from which he has excluded the public:

> Only under very special circumstances is the search without a search warrant of a . . . business office . . . justifiable and hence not a violation of the Fourth Amendment. . . . This is a most precious right, and the general requirement that a search warrant be obtained is not lightly to be dispensed with.
>
> . . .
>
> When a Service officer has reason to search . . . the nonpublic areas of a commercial building, he should, in the absence of consent, seek an appropriate search warrant based on probable cause to believe that violators or evidence of the violation of the civil or criminal provisions of the immigration laws are on the premises.

The Law of Search and Seizure for Immigration Officers, supra, pp. 25 & 26.

It follows that a farmer, whose business is producing agricultural commodities and whose commercial premises include his fields, is entitled to the same standard of protection under the Fourth Amendment that other businessmen enjoy, all else being equal. In other words, if a farmer exhibits an actual and reasonable expectation of privacy as to his fields, then the government may not engage in warrantless entry onto or search of those fields without consent, unless the search falls within the narrow category of exceptions to the warrant requirement.

As a rule, farmers do exclude the public from their production areas. Conscious of the potential problems of theft, vandalism, and disruption of their business operations, farmers generally prohibit the public from entering their fields. Where practical, many growers post "no trespassing" signs and erect fences or gates in order to exclude the public from their fields. Growers or their agents frequently take appropriate measures to order from their lands trespassers who may be discovered thereon.

By taking such measures, farmers in effect "close" their fields. The fact that it is not feasible for farmers to wall off their fields from possible intruders should have no effect upon their expectation of privacy which they otherwise exhibit. One District Court of Appeal in California elaborates on this idea:

> . . . Short of erecting an impenetrable enclosure, we can conceive of no other feasible measures the rural dweller might reasonably undertake to assert and preserve his individual right of privacy. We agree with the *Phelan* court that no perceptible difference exists "between (wholly) fenced land on the one hand and open land having a particular enclosed area on the other hand, insofar as the Fourth Amendment is concerned." [Citation.] To contemplate a contrary conclusion would itself lend credence to a specter of citadel-like fortifications in order to safeguard an otherwise objectively reasonable expectation of privacy of the contemporary rural dweller, a refuge neither required nor compatible with established constitutional principles."

Burkholder v. Superior Court, 96 C.A.3d 421, 429, 158 Cal.Rptr. 86 (1st D.C.A., Cal. 1979).

IV

THE POLICY OF IMMIGRATION AUTHORITIES WHICH REGARDS AGRICULTURAL LANDS PER SE AS UNPROTECTED BY THE FOURTH AMENDMENT IS CONTRARY TO PROPER FOURTH AMENDMENT ANALYSIS

This Court has noted that the Fourth Amendment generally requires that a warrant be obtained, and the burden of showing an exemption (e.g. exigent circumstances or pervasively regulated business) from this requirement is on the government. *Chimel v. California,* 395 U.S. 752, 762, 23 L.Ed.2d 685, 89 S.Ct. 2034 (1969); *United States v. Jeffers,* 342 U.S. 48, 51, 96 L.Ed. 59, 72 S.Ct. 93 (1951); *McDonald v. United States,* 335 U.S. 451, 456, 93 L.Ed. 153, 69 S.Ct. 191 (1948). ". . . Except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court,* 387 U.S. 523, 528-529, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967); *Marshall v. Barlow's, Inc., supra* at 312.

The policy of the Border Patrol which regards agricultural lands *per se* as beyond the scope of Fourth Amendment protections is contrary to the above-noted presumption and burden of proof. The warrant requirement is the rule, not the exception. A policy which circumvents that rule opens the door to a host of potential situations of agent misconduct or mistake. Such misconduct could include searches motivated by bribery or by personal reasons such as an agent's personal dislike of or quarrel with a grower. Such mistakes occur when Border Patrol agents apprehend citizens or documented workers who may not be carrying documentation on their persons at the time of apprehension.

In order to minimize such instances of misconduct or mistake Border Patrol agents should be required to follow the same procedures under the Fourth Amendment when they wish to search an agricultural field closed to the public that all law enforcement officers must follow when they wish to search any commercial premises not open to the public.

CONCLUSION

In the case at bar, the Florida Supreme Court correctly held that the "open fields" exception does not apply to private property from which the public is excluded. A contrary holding would have undercut this Court's holding in *Katz* that the protections of the Fourth Amendment apply to an area wherein an individual exhibits a subjective and reasonable expectation of privacy.

WHEREFORE, *amici curiae* California Farm Bureau Federation and Florida Farm Bureau Federation respectfully pray that this Court affirm the judgment below.

Respectfully submitted,

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Amicus Brief

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CASE NO. 81-1636

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF FLORIDA,

Petitioner,

v.

FRANK J. BRADY, et al.,

Respondent.

On Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

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IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. 81-1636

STATE OF FLORIDA,	:
Petitioner,	:
v.	:
FRANK J. BRADY,	:
Respondent.	:

MOTION FOR LEAVE TO FILE BRIEF
OF AMICUS CURIAE

TO THE HONORABLE JUDGES OF THE UNITED STATES SUPREME COURT:

The instant case is before this Court on Petition for Certiorari from a decision of the Supreme Court of Florida entered on October 15, 1981 and rehearing denied January 8, 1982 and reported at 406 So.2d 1093 (Fla. 1982). Since that time, Petitioner has filed a Petition for Writ of

Certiorari with this Court. The matter is not yet scheduled for disposition.

In the ensuing hiatus, Amicus Curiae representatives of the National Association of Criminal Defense Lawyers, Inc. (NACDL) have discussed the case and decided that the issues were of such importance to defense lawyers throughout the nation that NACDL should take a position and offer their assistance to the Court.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 2,000 lawyers who are citizens of every State and all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors or judges of the state or federal courts. Among NACDL's

stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstorne of this organizational objective, and of our criminal justice system, is the fundamental constitutional right to be free of unreasonable searches and seizures. NACDL is very concerned about any decision that would undercut or dilute this constitutional guarantee.

Pursuant to Rule 36 of the Supreme Court Rules, NACDL seeks leave of this Court to join the case in its present posture as Amicus Curiae and to provide the Court with a brief in the case.

Forty copies of the brief are herewith being filed with the Clerk of Court and, as such, this case will not be

delayed by granting NACDL leave to intervene as Amicus Curiae.

WHEREFORE, for the foregoing reasons, the National Association of Criminal Defense Lawyers, Inc. (NACDL) seeks leave to file their brief of Amicus Curiae in the above captioned case.

Respectfully submitted,

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
2401 Douglas Road
Miami, Florida 33134

By: THEODORE KLEIN
THEODORE KLEIN

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing Motion for Leave to File Brief of Amicus Curiae of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support

of Appellant has been served upon: STEVEN GREENBERG, ESQ., Attorney for Frank Brady, 744 N.W. 12 Avenue, Miami, Florida, and ROBERT L. BOGEN, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, by mail on the date set forth below.

THEODORE KLEIN

THEODORE KLEIN

DATED:

TABLE OF AUTHORITIES

Air Pollution Variance Board of State of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974) 12

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State v. Kaaheen, 59 Hawaii 23, 575 P.2d 462 (1978) 5

State v. Kender, 60 Hawaii 301, 588 P.2d 447 (1979) 5

United States v. Basile,
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United States v. Holmes,
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OTHER AUTHORITIES

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INTEREST OF AMICUS CURIAE

(1) The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 2,000 lawyers who are citizens of every State, and all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors, and judges of the state and federal courts.

(2) Among NACDL's stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures.

The purposes of the Association, as set out in its bylaws are:

> (a) To promote study and research in the field of criminal defense law and the related arts;

(b) To disseminate by lecture, seminars and publications the advancement of the knowledge of the law as it relates directly and ancillary to the field of criminal defense practice;

(c) To promote the proper administration of criminal justice;

(d) To foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases;

(e) To foster periodic meetings of defense lawyers and to provide a forum for the material exchange of information regarding the administration of criminal justice and thereby concern itself with the protection of individual rights and the improvement of criminal law, its practice and procedures.

(3) The National Association of Criminal Defense Lawyers has received consent of both parties for the filing of this brief.

QUESTION PRESENTED

WHETHER A FORCED AND WARRANTLESS ENTRY OF A PRIVATELY FENCED, LOCKED AND POSTED FIELD VIOLATES THE FOURTH AMENDMENT GUARANTEE AGAINST UNLAWFUL SEARCHES AND SEIZURES.

ARGUMENT

I. THE FOURTH AMENDMENT EXTENDS TO A FIELD WHERE A REASONABLE EXPECTATION OF PRIVACY IS MANIFESTED BY SUBSTANTIAL MEASURES TO EXCLUDE THE PUBLIC.

A. The Open Fields Doctrine Has Limited Application in Light of the Reasonable Expectation of Privacy Test.

The open fields doctrine emerged in the 1924 opinion Hester v. United States, 265 U.S. 57. In that case revenue agents entered upon defendant's property and observed him from across a field in an exchange of what appeared to be moonshine whiskey. The defendant, convicted of concealing distilled spirits, challenged the revenue agent's testimony as a violation of his Fourth Amendment rights. Affirming the conviction, the United States Supreme Court ruled conclusorily that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields." Id. at 59.

Petitioner contends that under the open fields doctrine the Fourth Amendment does not extend to protect activities conducted in any open field. According to Petitioner, any area that is neither a building, part of a building nor the curtilage of a building is an "open field," regardless of the extent to which a landowner may seek to protect it from intrusion by outsiders through fences and the like. Such a position makes the open fields doctrine a mechanical test which conclusively presumes that there is no constitutionally protected reasonable expectation of privacy in an open field.

Such a position is untenable in light of the developments occurring in the law of search and seizure following the Hester opinion. The Florida Supreme Court makes that point in the case sub judice, stating:

> Although the Hester opinion has not been overruled, subsequent opinions indicate that the open fields doctrine cannot be used as carte blanche for a warrantless search simply because the location searched is not part of a dwelling or its adjacent

curtilage. State of Florida v. Brady, 406 So.2d (Fla. 1981).

The restrictive property notions embodied in the open fields doctrine have been most significantly diminished by the Supreme Court's opinion in Katz v. United States, 389 U.S. 347. The Court in Katz enunciated the Fourth Amendment "reasonable expectation of privacy standard," stating:

> [T]he correct solution of the Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area...' This effort to decide whether or not a given "area" is "constitutionally protected" deflects attention from the problem presented in this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Id., 350-52. (citations omitted).

Rather than categorizing any given type of property as outside the

protection of the Fourth Amendment, the Katz decision suggests a more flexible two-prong test, announced by Justice Harlan in his concurrence:

> . . .there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus, a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. Id. at 361.

To detemine the application of Fourth Amendment protection, the inquiry thus turns to whether there are satisfactory criteria to indicate that an individual has a subjective wish to keep his property and/or activities private, and whether these criteria serve as objective indicia to outsiders that they are excluded from entering that individual's private realm. But what factors implicate this privacy interest? Although there is no

dispositive law on the issue, several subjective and objective factors have commonly been considered in lower court decisions applying the Katz test. Such factors include a large collection of items that can serve as physical barriers, such as hills, trees, fences, weeds, curtains and blinds. See: Burkholder v. Superior Court, 96 Cal. App.3d 421, 153 Cal. Rptr. 86 (1979); State v. Chort, 91 N.M. 584, 577 P.2d 892 (1978); State v. Kaaheen, 59 Hawaii 23, 575 P.2d 462 (1978); State v. Kender, 60 Hawaii 301, 588 P.2d 447 (1979); State v. Fearn, 345 So.2d 468 (La. 1977). The presence or absence of no trespassing signs has also been considered by courts in analyzing an existing barrier as indicating a justifiable expectation of privacy. As one commentator has stated:

> The posting of signs by a defendant is a fairly strong indicator of a subjective expectation of privacy. In addition, if posting conforms with statutory standards, special sanctions may apply to anyone who enters without legal authorization. Even if there are procedural deficiencies in the posting,

> however, posting in almost any form should increase the likelihood that a defendant's privacy expectations will be held objectively reasonable because some persons will heed a written warning of this type irrespective of its legal basis. J. BUSH, R. BLY, Expectation of Privacy Analysis and Warrantless Trash Reconnaissance after Katz v. United States, 23 Ariz.L.Rev. 283, 291 (1979) [hereinafter cited as BUSH]. See also: Burkholder, supra.

Other factors considered by courts in analyzing the reasonable expectation of privacy issue after Katz include the number of persons with legitimate access to an area, and the number of persons outside the area capable of viewing it. The latter factor incorporates a frequently drawn distinction betwen rural and urban areas, with the rural generally drawing a more reasonable expectation of privacy than the urban area. BUSH at 293-93. See also, United States v. Holmes, 521 F.2d 859 (5th Cir. 1975); Gedko v. Cady, 588 F.2d 840 (7th Cir. 1978).

In applying the reasonable expectation of privacy standard of Katz and its

progeny to the outmoded and mechanical open fields doctrine, it becomes clear that Fourth Amendment protection does not simply shrivel and die at the sight of an open air field, farm or other tract of land. More particularly, where factors such as those described above implicate a landowner's subjective and objective privacy interest, the Fourth Amendment protects that area from unreasonable searches and seizures. In other words, as stated by the Florida Supreme Court in the case sub judice:

> "Under the reasoning of Katz, if the owner or occupier of a field seeks to keep it private and demonstrates an actual intention to do so, and his expectation is one that society is willing to recognize as reasonable, then Fourth Amendment protections extend to activities in that field. Brady, supra at 1096.

B. Respondent's Fenced, Locked and Posted Field Creates the Substantial Barriers Necessary to Meet the Reasonable Expectation of Privacy Test for Fourth Amendment Protection.

The measures taken by Respondent to insure privacy on his 1800-acre ranch

satisfy the two-prong test of Katz. As the record clearly indicates, the ranch was totally fenced with tightly strung multi-strand barbed wire, surrounded by a drainage ditch, and posted at regular intervals, including the gates, with "no trespassing" signs. The fence was padlocked. The ranch was never open to the public. These factors unmistakably indicate that Respondent demonstrated an expectation of privacy, thus satisfying the "subjective" prong of the Katz test.

The more difficult question concerns the second or objective part of the Katz test: Whether the expectation of privacy was one which society is prepared to accpet as reasonable. Katz, supra. (Harlan, J., concurring opinion.) There is no dispositive case law on this issue. However, the fencing, posting and locking of Respondent's ranch, located in a rural area and totally closed to the public constitute the objective barriers held by the lower courts to satisfy the reasonbale expectation of privacy standard. The current trend of authority, therefore, would indicate

that society is prepared to accept Respondent's expectation of privacy in his enclosed ranch as "reasonable."

From a practical viewpoint, it is difficult to imagine how Respondent could have taken more clearly objective steps to transform an unprotected open field into an enclosed area. The tight barbed wire fence, no trespassing signs, and locked gates that totally exclude the public would cause any objective observer, including the State, to realize that a reasonable expectation of privacy exists.

II. THE FORCED AND WARRANTLESS ENTRY ON RESPONDENT'S FENCED, LOCKED AND POSTED FIELD WAS AN UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT.

The purpose of the Fourth Amendment's warrant requirement is to protect individuals from intrusions by the government into their private spheres. A warrantless search can only be justified on the basis of one of the established and narrowly applied exceptions to the warrant requirement. These exceptions apply where the general welfare through government action outweighs the individual's privacy interest. In the present case, it is difficult to excuse the behavior of the law enforcment officers on any of these grounds.

First, it is difficult to understand why the officers did not attempt to get a search warrant at the outset, oased upon the information they received through the Elliott wiretap. Petitioner's contention that there was insufficient probable cause for a search warrant because the officers ". . . could not have known with any certitude

exactly where, when and how the contraband would arrive. . ." is belied by the facts. The officers knew where (R. 28), and when (R. 28-29, 31), and how (R. 28-29).

However, even if there was not probable cause, the course of the police officers' conduct on the evening in question cannot be condoned in a democractic society. Prior to the occurrence of any criminal activity on the Brady ranch, the officers, with weapons and sniperscopes, surrounded the Brady ranch, and cut through a chain and padlock securing the front gate. They rammed down the back gate with a vehicle, surrounded Respondent's airstrip, and waited 2-1/2 hours on private property for something to happen. When the airplane whose number they could not identify finally landed, they charged the air strip and detained three persons at gunpoint without seeing any contraband.

Petitioner attempts to justify this forced and warrantless search on the basis of "open fields," "mere trespass" and "plain view." To support its

argument, Petitioner cites several cases in which the Courts have found no violation of constitutional rights in situations involving open fields and warrantless searches. Applying the reasonable expectation of privacy test, however, these cases are factually distinguishable from the instant case.

In Air Pollution Variance Board of State of Colorado v. Western Alfalfa Corp., 416 U.S. 861 (1974), the Court upheld a warrantless search under the open fields doctrine. However, the Court indicates that the case would have been different if the "trespassing" Health Department inspector had been on the premises from which the public was excluded. Respondent in this case, however, went to great lengths to exclude the public from access to his land. As noted earlier, this factor is a clear indication of Respondent's reasonable expectation of privacy under the Katz Fourth Amendment standard. The forced and warrantless trespass by the police officers in this case was a blatant violation of Respondent's constitutional rights.

Giddens v. State, 274 S.E.2d 595 (Ga. 1980) is likewise inapplicable. The court in that case noted:

> The wire fence of a type commonly used to restrict movement of livestock posed little obstacle to the entrance of law enforcement officers who were only later aware that the gate to the field was locked. The officers received no notice prior to their entry that the owner or rightful occupant forbade such entry. Id. at 597.

In United States v. Basile, 569 F.2d 1053 (9th Cir.) cert. denied, 436 U.S. 920 (1978), the Court refused to suppress evidence found in a truck which had been abandoned 100 yards from the defendant's home since there could be no reasonable expectation of privacy in the abandoned vehicle. The facts in Basile are clearly distinguishable from those in the case sub judice. In Basile the area of search was neither posted nor enclosed in any way that might discourage entry. Here, the field was enclosed by measures that blocked and discouraged entry. The entry here was not justified, but an unlawful and

unreasonable search in violation of Resondent's Fourth Amendment rights.

In United States v. Brown, 473 F.2d 952 (5th Cir. 1973), the court upheld a search of a chicken coop on an abandoned, unposted farm. These factors clearly distinguish Brown from the case at bar. Unlike the present case, in Brown there was no reasonable expectation of privacy in the abandoned and unposted farm.

Many of the cases which justify a warrantless search under the "open fields" doctrine essentially apply this concept as an extension of the "plain view" doctrine. These cases contain language such as:

> . . . it has been held that a mere trespass will not invalidate evidence which is discovered in plain sight during such a trespass. Boim v. State, 194 So.2d 313, 315-16. (Fla. 3d DCA 1967).

However, such analysis does not apply to the facts in this case. There was nothing viewed in "plain sight" here. The officers observed nothing of an incriminating nature even after they had travelled several hundred yards into

Respondent's property. Even when the officer came within 20 feet of the airplane, he didn't see any bales of marijuana. Despite this fact, he ordered the subjects to raise their hands and to walk toward him. (R. 62-63). Interestingly, the airstrip itself was surrounded by a second barbed wire fence. (R. 62). Not until the subjects were ordered to walk forward with raised hands did the officer cross the second barbed wire fence and observe the bales of suspected marijuana.

Petitioners additionally argue that the actions of the police in this case constituted a "mere trespass" against which Resondents had no reasonable expectation of privacy. First, as has been previously noted, the Brady ranch was located in a rural area, surrounded by a drainage ditch, barbed wire fencing and no trespassing signs. It was never open to the public, and the only two gates to the property were locked and secured. (R. 4-5). The airplane landed at night in an airstrip surrounded by barbed wire and not visible from the road. (R. 40). That Mr. Brady had a

legitimate and reasonable expectation of privacy is without question.

Petitioner calls the forcible breaking and entering on Respondent's patently private property a "mere trespass." Respondents would argue that the actions of the police officers were criminal in nature and intent. The trial judge described the police officers actions in this way: (R. 121-122):

> So, we're sort of left with the fact that these officers broke down gates and cut chains to enter private property who admit they they didn't have any probable cause and couldn't get a search warrant if they tried. Sort of got egg on their face when they turn around and say that the evidence that they seized in violation of his constitutional right should nevertheless be admissible.

The outrageous conduct by the police officers under color of authority cannot be passed off as a "mere trespass." Nor can it be condoned under the "open fields" doctrine, regardless of its validity in other cases. The criminal conduct of the police officers in this

case cannot be justified on the "policy" grounds advanced by Petitioner. In essence Petitioner asks the Court to make the Constitution and the Bill of Rights inapplicable to cases involving drugs. The balancing test proposed by Petitioner is a terrifying high wire act treading on the threads of our democratic society. It would sanction the criminal actions of the police by nullifying the constitutional protections which have served as our society's only barrier against illegal and intrusive government conduct. If the activities of the persons and institutions sworn to uphold and protect our individual liberties go unregulated by constitutional restraints, democracy and freedom will not survive.

CONCLUSION

For reasons and authorities cited herein, the Respondents submit that the decision of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

NATIONAL ASSOCIATION OF
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on behalf of the National Association of Criminal Defense Lawyers, this 27th day of September, 1982, to REX E. LEE, Solicitor General, U.S. Department of Justice, Washington, D.C. 20503, ROBERT L. BOGEN, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, and STEVEN GREENBERG, Attorney for Frank Brady, 744 N.W. 12th Avenue, Miami, Florida 33136.

By: THEODORE KLEIN
THEODORE KLEIN

CERITIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on behalf of the National Association of Criminal Defense Lawyers, this ___ day of September, 1982, to the Solicitor General, U.S. Department of Justice, Washington, D.C. 20503, ROBERT L. BOGEN, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, and STEVEN GREENBERG, Attorney for Frank Brady, 744 N.W. 12th Avenue, Miami, Florida 33136.

By: _____
THEODORE KLEIN

Amicus Brief

3

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NO. 81-1636

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF FLORIDA,

Petitioner,

vs.

FRANK J. BRADY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MOTION OF WESTERN GROWERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION OF WESTERN GROWERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Western Growers Association respectfully moves this Court for leave to file the accompanying brief **amicus curiae** in support of Respondents' position in this case.

INTEREST OF WESTERN GROWERS ASSOCIATION

Western Growers Association is a non-profit trade association composed of approximately 900 members who grow and ship over 80 percent of the fresh fruits and vegetables produced by California and Arizona. The Association was formed more than 50 years ago for the express purpose of protecting and representing the interests of the farming community. Because this Court's decision will have a profound effect upon the Constitutional rights of its members, Western Growers Association is particularly concerned that it have an opportunity to present its views.

ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

Although the facts of this case are confined to a warrantless police search for criminal activity, this Court's decision will determine whether or not the Fourth Amendment guarantees the farmers of this nation the right to conduct their business and go about their land secure from arbitrary and unrestrained civil, as well as criminal, investigations.

This Court has never interpreted, nor applied, the so-called "open fields" doctrine derived from **Hester v. United States,** 265 U.S 57 (1924), to permit such wholesale and unreviewed intrusions. **Hester,** and those

cases in which this Court has referred to the "open fields" language of **Hester**, simply stands for the unremarkable proposition that illegal activity in "plain (open) view" or conduct in places "open to the public" are not protected by the Fourth Amendment. Not all activity or conduct on farmland, however, is in "plain view" nor are most agricultural fields "open to the public".

Even if **Hester** could be construed to allow the armies of regulatory agents and governmental officials to invade at will the private domain of the farmers of this country, **Katz v. United States,** 389 U.S. 347 (1967), effectively buried such blanket use of the "open fields" dogma. Simply stated, **Katz** protects a citizen's reasonable expectation of privacy, whether or not he is in a home, an office, a telephone booth, a backyard, or a field of growing corn.

While it may be argued that no one can expect to be secure from prying eyes when his activities are in "open view" of the public or when he is at a location open to the general populous,it is equally true that the government cannot disregard well-recognized "indicia" or "badges" of privacy. Farms and ranches have "no trespassing" signs; homes are kept private by shut, though many times unlocked, doors and curtains; offices display "private" or "employees only" signs; businesses erect chain link fences. All of these methods of securing privacy can reasonably be expected to be given deference by government powers.

Petitioner argues that such privacy guarantees would create a "technical escape hatch for criminals" at the

expense of the "decent folk". No doubt criminals will take advantage of those areas that are secure from warrantless searches, as they have for centuries, but the authors of the Fourth Amendment determined more than two hundred years ago that such transgressions were a small price to pay for the fundamental protections of the Fourth Amendment.

REASONS FOR GRANTING THIS MOTION

Petitioner is concerned with the need to provide effective law enforcement and to detect those who traffic in crime, while Respondent are anxious about their own fate. Western Growers Association, however, represents the interests of those who will be most affected by this Court's decision — those who till and harvest America's farmland.

Petitioner attempts to narrow this Court's view by equating the desire for privacy and security with the need to conceal crime; Western Growers Association's brief is aimed at impressing this Court with the fundamental right of farmers to be free from arbitrary and unrestrained criminal and regulatory searches, not because they want to conceal crime, but because such guarantees are basic to a free society.

WHEREFORE, WESTERN GROWERS ASSOCIATION respectfully moves for permission to file the attached brief **amicus curiae.**

Respectfully submitted,

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BRIEF OF AMICUS CURIAE WESTERN GROWERS ASSOCIATION IN SUPPORT OF RESPONDENTS

———

Western Growers Association respectfully submits this brief in support of Respondents' position.

INTEREST OF AMICUS CURIAE

A statement describing Western Growers Association and its interest in this case is set forth in the proceeding motion requesting leave to file this brief **amicus curiae.**

SUMMARY OF ARGUMENT

The so-called "open fields" doctrine, derived from this Court's decision in **Hester v. United States,** 265 U.S.57 (1924), did not at that time, nor has the Court since so construed it to, permit unrestrained intrusions by government agents on this nation's farmland. **Hester,** and those cases where the Court references to **Hester,** simply stand for the well established proposition that illegal activity in "plain (open) view" or conduct in places "open to the public" is not protected by the Fourth Amendment.

Even if **Hester** could be interpreted to allow government officials the unfettered discretion to search farmland at will, **Katz v. United States,** 389 U.S. 347 (1967), no longer permits such blanket intrusions. Under **Katz,** the issue is not whether a person is in a constitutionally protected area; the question is whether that person has a reasonable expectation of privacy.

Petitioner asserts that a farmer cannot factually have a justifiable expectation of privacy while he is on his land, because his crops are located in the open air. To the contrary, by securing his property with such traditional

"badges" of privacy as "no trespassing" signs, fences, and chain barred access roads, a farmer has every reason to believe that the government, and the public in general, will respect his right to be left alone, just as Katz did when he closed the door of the glass enclosed telephone booth.

Finally, Petitioner trumpets the need to provide effective law enforcement and to detect those who traffic in crime as replacements for the security guarantees of the Fourth Amendment. According to Petitioner, society is not prepared to create a "technical escape hatch for criminals" just to provide farmers with the privacy commanded by the Constitution. Although such constitutional guarantees have their drawbacks, the balance was struck more than two hundred years ago against arbitrary and unrestrained governmental intrusion and in favor of those lawabiding citizens who would suffer such uncontrolled searches.

ARGUMENT

I.

THE SUPREME COURT HAS NEVER ADOPTED, EITHER IN **HESTER** OR SINCE, THE CONCEPT THAT FARMLAND COULD BE SEARCHED AT WILL

In **Hester v. United States**, 265 U.S. 57 (1924), this Court noted that "the special protection accorded by the Fourth Amendment to the people in their 'persons,

houses, papers, and effects,' is not extended to the open fields." The "open fields" referred to in **Hester** apparently consisted of a wild area that was used by visitors as they approached Hester's house. From this field, revenue officers observed illegal moonshine whiskey which they later siezed. Under these facts, **Hester** stands for no more than the concept that unlawful activity in "plain view" of the police, who are located on property "open to the public", is not protected by the Fourth Amendment.

Since **Hester,** this Court has referenced to the "open fields" exception in only a few cases and relied on it in just four. None of those decisions allow the warrantless search of farmland that has been closed to the public.

In **Katz v. United States,** 389 U.S. 347, n. 8 (1976), this Court merely observed that an "open field" has been traditionally considered a constitutionally unprotected area. Similarly, **Hester** was footnoted in **Bivens v. Six Unknown Named Agents,** 403 U.S. 388, n. 6 (1971), as an example of a state trespass claim defeated by Fourth Amendment considerations. **Cady v. Dombrowski,** 413 U.S. 433 (1974), although mentioning the "open fields" doctrine, left the **Hester** issue undecided. In **Rakas v. Illinois,** 439 U.S. 128, n. 12 (1978), the Court again footnoted **Hester,** but only for the proposition that a property interest in premises is not necessarily sufficient to establish an expectation of privacy.

In four other decisions, reliance was placed on **Hester,** or more precisely on the word "open", as precedent for the

axiom that what one leaves exposed to public view is not protected by the Fourth Amendment. In **G.M. Leasing Corp. v. United States,** 429 U.S. 338, 352 (1977), the Court permitted the seizure of automobiles that were located in places open to the public. Justice Rehnquist, in his concurring opinion in **Donovan v. Dewey,** 452 U.S. 594 (1981), noted that an open rock quarry could be inspected since it could be seen with the naked eye from a public area. In **United States v. Santana,** 427 U.S. 38, 42, 46 (1976), the Court upheld an arrest because the suspect "was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." Again, the Court cited **Hester.** Perhaps the decision that comes closest to defining the perimeters of **Hester,** however, is **Air Pollution Variance Bd. v. Western Alfalfa,** 416 U.S. 861, 865 (1974). There the Court ruled that because a Colorado Department of Health inspector merely "sighted what anyone in the city near the plant could see in the sky — plumes of smoke," **Hester** controlled. Significantly, the Court felt it necessary to explain that "we are not advised that he was on premises from which the public was excluded."

Thus, the Supreme Court has never permitted the random and unrestrained search urged on this Court by Petitioner. **Hester** merely represents the maxim that what a person knowingly exposes to the public is not sheltered by the Fourth Amendment. On the other hand,

the Court's careful comment in **Air Pollution Variance Bd.** implies that what a citizen reserves from the public, whether it is on farmland or not, is entitled to constitutional protection.

II.

THE LOWER COURTS HAVE CONSISTENTLY APPLIED **HESTER** AS SUPPORT FOR THE "PUBLIC VIEW" EXCEPTION, NOT AS PRECEDENT FOR ARBITRARY, WARRANTLESS INVASIONS OF FARMLAND

With rare exception, the federal and state courts have reserved citation to **Hester** for those cases in which a person knowingly exposes his activities to public or "open" view.

For instance, in **Ehlers v. Bogue,** 626 F.2d 1315 (5th Cir. 1980), a county health officer made a visual inspection of the exterior of an apartment building and of a refuse dumpster. The Court noted that there is no Fourth Amendment protection "against observation by a public official of what is observable by the general public." Significantly, the Fifth Circuit continued: "This concept, known as the 'open fields' doctrine, was applied in a very similar case, **Air Pollution Variance Board v. Western Alfalfa Corp.,** 416 U.S. 861, 94 S. Ct. 2114, 40 L.Ed 2d 607 (1974)." Similarly, the same circuit in **United States**

v. Brown, 473 F.2d 952 (5th Cir. 1973), permitted police officers to search an abandoned farm, apparently open to the public, without a warrant. Again, in **United States v. Varkonyi,** 645 F.2d 453, 457 (5th Cir. 1981), the Fifth Circuit allowed the warrantless arrest of illegal aliens hiding in places visible from public property, based on its reading of **Hester.** The Court noted, citing **Hester,** that "law enforcement officers may enter upon private property to make warrantless arrests, provided the arrest is based on probable cause and the person is in 'plain view' ".

The Ninth Circuit Court of Appeals, in accord with the Fifth, has also interpreted **Hester** as permitting warrantless searches of truly "open" land. In **United States v. Basile,** 569 F.2d 1053 (9th Cir. 1978), the Court, citing **Hester,** upheld the seizure of marijuana found by looking through a window in an abandoned van located on land open to the public. In **United States v. Freie,** 545 F.2d 1217 (9th Cir. 1976), the Ninth Circuit also refused to extend Fourth Amendment protection to the confiscation of marijuana from an "isolated mountainous area" that had not been closed to the public. The Court observed that in a "factually similar" case, **United States v. Pruitt,** 464 F.2d 494 (9th Cir. 1972), the Court permitted the search of an area that "any casual passer-by would have access" to.

In **Patler v. Slayton,** 503 F.2d 472, 477 (4th Cir. 1974), shell casings and spent bullets were seized by government agents from the pasture of a family farm. In approving the

search of an unfenced area, the Fourth Circuit mentioned that the defendant could not "reasonably expect others to recognize and respect the privacy of the area". In **Janney v. United States,** 206 F.2d 601 (4th Cir. 1953), the same court also upheld the seizure of whiskey viewed from a location on a 30 acre farm outside the fenced portion of the property. In **United States v. Ramapuram,** 632 F.2d 1149 (4th Cir. 1980), the Court similarly found that the defendant could not legitimately expect the contents of an unlocked trunk of a "junker", situated in an open field "near" a fenced paddock, to remain secure from prying eyes.

The Seventh Circuit's decision in **United States v. Cain,** 454 F.2d 1285 (7th Cir. 1972) can likewise be distinguished from the instant case. The Court ruled that federal game management agents had lawfully confiscated evidence of illegal wild fowl baiting. Apparently, the hunting club where the investigation took place was not closed off to the public.

The Court in **United States v. Cobler,** 533 F. Supp. 407 (W.D. Mich. 1982), continued the pattern of relying on **Hester** for the rule that items located in public areas and in "plain view" are not protected by the Fourth Amendment. In **Cobler,** federal and state agents driving down a private road, evidently open to the public, discovered a truck parked on a dirt farm path which surrounded the edge of an open field. In addition, the curtains of the camper were only partially drawn so as to allow the agents

to see the contents of the truck. Thus, the District Court found that there was no reasonable expectation of privacy.

In **People v. Dansenbrock,** 96 Ill. App. 3d, 625 421 N.E.2d 948 (1981), the Illinois Court of Appeal, in ruling a warrantless search legal, placed a great deal of reliance on the fact that the marijuana plants which were the subject of the seizure were seen from a vantage point on the defendant's "apparently rural property" that was not "even marked against trespassing."

Thus, although some courts may have traveled beyond the limits of **Hester,** the vast majority of jurisdictions have recognized it for what it is — a variation of the "public view" doctrine.

III.

KATZ ABOLISHED RELIANCE UPON COMMON LAW PROPERTY CONCEPTS AND NOTIONS OF CONSTITUTIONALLY UNPROTECTED AREAS, SUCH AS "OPEN FIELDS"

Since **Hester,** and with its decision in **Katz v. United States,** 389 U.S. 347 (1967), this Court turned its focus in search and seizure cases away from the concept of constitutionally protected and unprotected areas. The Court held that the governmental bugging of a caller in a public telephone booth was a search subject to the warrant requirements of the Fourth Amendments. Katz had

argued that the bugging was a search on the theory that a telephone booth may be characterized as a "constitutionally protected area" within which a person is protected by the Fourth Amendment as he would be in his own home or office. The Supreme Court rejected that approach, stating that the effort to decide whether a given "area" is to be considered constitutionally protected is essentially irrelevant.

> "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." **Id.,** at 351-352.

Thus, **Katz** shifted the emphasis from an examination into common-law property distinctions to an inquiry in which the individual's reasonable expectation of privacy becomes the focal point. Justice Harlan, concurring in **Katz,** articualted the new criteria more fully by outlining a two-pronged test for determining the reasonableness of the individual's expectation of privacy:

> "The rule that has emerged from prior decisions is that there is a two-fold requirement, first that a person exhibit an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable'." **Id.,** at 361.

In the present case, no one can seriously argue that Respondents did not have a subjective expectation of privacy in the ranch searched. The entire area was enclosed by a multi-strand barb wire fence. "NO TRES-

PASSING" signs were posted at frequent intervals. The gates to the property were padlocked and secure, and the ranch was never open to the public.

Petitioner does, however, challenge the second peg of the inquiry. Florida asserts that Respondents were not justified in assuming that government officials would respect their right to be left alone. Petitioner bases its conclusion on the following reasoning:

> "... an open field cannot reasonably be expected to be private. It is exposed, it is open-air, it is not self enclosed as a house or a building is. The very condition of an open field is open to view. Planes or helicopters can fly over it. It is unreasonable that the prying and curious eyes of trespassers would not invade one's subjective manifestation of privacy." Brief for Petitioner, at p. 18-19.

In **State v. Byers,** 359 So. 2d 84 (La. 1978), the Louisana Supreme Court rejected an identical argument. The Court noted that marijuana growing in the field in question was not visible from the public road. The property was posted with signs that bore such announcements as: "PRIVATE ROAD"; "DO NOT ENTER"; "POSTED NO HUNTING, FISHING, TRESPASSING". A chain barred access to the private road, though it was down at the time of the search and seizure. Under these circumstances, the **Byers** Court ruled that the "open fields" doctrine ascribed to in **Hester** was inapplicable, since there was no evidence in **Hester** that specific steps were taken to exclude the public from the area searched.

The Court also rejected the state's reliance on the "plain view" exception:

> The doctrine, of course, does not apply if the view is from a place that the officers have no right to be. In the present case, the officers observed the marijuana from a position on the property. The point of observation was a place that the officers had no right to be without a search warrant. Accordingly, we conclude that the plain view doctrine is inapplicable." **State v. Byers,** 359 So. 2d at 87.

In **United States v. FMC Corp.,** 428 F. Supp. 615, 618 (W.D.N.Y. 1977), the Court likewise refused to adopt the government's argument that the "open fields" doctrine allowed warrantless government inspections of a 10 acre fenced lagoon.

The warrantless aerial surveys of a chemical plant in **Dow Chemical Co. v. United States,** 536 F. Supp. 1355 (E.D. Mich. 1982), similarly prompted the Environmental Protection Agency to assert the "open fields" dogma. The District Court disagreed:

> "The important question that has to be faced is what is constitutionally offensive scrutiny. It would be fallacious to extend the open fields exceptions to the facts of **Dow** because if it were, advanced technology has given us microphones and cameras that can make an enclosed room an 'open field'. Spacially based criteria of eligibility for fourth amendment protection ignore the pertinent question as to what it is we wish to see preserved from the offensive scrutiny." **Id.** at 1371.

Even more to the point is **Burkholder v. Superior Court,** 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (1979). Again, entry on the property was openly restricted by posted signs along, and locked gates across, the rural access road "signifying an intention to deny access to the public in general, including government agents." The Court noted that the marijuana patch discovered through the unauthorized search was not in plain view and "became observable only through a flagrant disregard of well recognized 'indicia' or 'badges of private ownership' intended to exclude the general public." The Court continued:

> "... no sound basis being apparent to reasonably foreseen or anticipated that uninvited government agents would enter to perform a warrantless exploratory search. [Citations omitted.] Short of erecting an impenetrable enclosure, we can conceive of no other feasible measure the rural dweller might reasonably undertake to assert and preserve his individual right to privacy." 96 Cal. App. 3d at 429, 158 Cal. Rptr. at 91.

In **State v. Carter,** 54 Or. App. 852, 636 P. 2d 460 (1981), the Oregon Court was equally unimpressed with the state's argument. The property in **Carter** was partially fenced, with entry along the driveway blocked by two gates. Two "No Trespassing" signs were posted. The government asserted that meter readers and service men were frequently permitted to enter the property, that the

gates were not always locked, that the "No Trespassing" signs meant nothing, and that defendants had no reasonable expectations of privacy. The Oregon court made short work of the argument:

> "Allowing limited access to the premises, however, does not open the property to the world; an occupier of property does not have to erect a stone bastion to manifest a subjective expectation of privacy." **Id.**, 636 P. 2d at 462.

When a search was made at a "remote, wild-appearing area" adjacent to a public highway and public rest areas, "exhibiting no indicia of ownership such as the posting of signs", however, a California Appellate Court held that, unlike the present case, the police were not reasonably "put on inquiry" that the property was private. **People v. Little,** 33 Cal. App. 3d 552, 109 Cal. Rptr. 196 (1973).

Thus, when a citizen takes deliberate measures to insure that his activities and conversations are protected from other persons, official or non-official, he has a justifiable expectation of privacy. In **Katz,** the defendant did little more than Respondents did in this case to assure himself of privacy. He put the public and the police on notice that he wished privacy, by shutting the glass telephone booth door. Although both the government and the public could easily tap his telephone call, Katz

justifiably expected that they would not intrude upon his privacy. Similarly, by posting the ranch property with "no trespassing" signs and by surrounding the acreage with barb wire, Respondents reasonably concluded that their privacy would be respected, even though the government or the public had the ability to encroach on their security. Any other conclusion would be an extreme paradox to the drafters of the Fourth Amendment, many of whom worked the soil themselves and all of whom lived in an agricultural society. They could not have meant to exclude the majority of the population from constitutional protection.

IV.

THE NEEDS OF LAW ENFORCEMENT WERE BALANCED AGAINST THE DESIRE FOR A FREE SOCIETY MORE THAN TWO HUNDRED YEARS AGO WITH THE WRITING OF THE FOURTH AMENDMENT

In its zeal to ferret out those who traffic in drugs, Petitioner loses sight of the values written into the Fourth Amendment. In **Almedia-Sanchez v. United States,** 413 U.S. 266, 274 (1973), this Court recalled the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:

> "These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensible freedoms. Among deprivations of rights, none is so effective in

> cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

Such fundamental rights are not to be equated, as Petitioner advocates, with the desire to conceal crime. As Mr. Justice Frankfurter instructed the Court in **Coolidge v. New Hampshire,** 403 U.S. 443, 453 (1971):

> "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need commentary of recent history to be condemned . . ."

Mr. Justice Holmes, dissenting in **Olmstead v. United States,** 277 U.S. 438 (1928), also warnings against sapping the heart of the Fourth Amendment in the interests of avoiding the creation of a "technical escape hatch for criminals":

> "For my part, I think it is less evil that some criminals should escape than that the government should play an ignoble part . . ."

Petitioner counsels that random unrestrained searches of farmland based on "sketchy, unconfirmed, hearsay information," or conceivably on whim, are an erosion of the Fourth Amendment that "society is prepared to accept as reasonable" in the interest of law enforcement. Those who till the soil and harvest the crops of this nation's farmland are not so prepared, however, to relinguish their personal security and privacy, nor should Petitioner be so myopic. As the Court noted in **Coolidge v. New Hampshire,** 403 U.S. 443, 454 (1971):

> "It may be that it is an obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

If indeed, a "no trespassing" sign or a locked gate can be ignored by the armies of regulatory and criminal investiators found in modern society, how long will it be before the unlocked home will also be fair game under Petitioner's dubious reasonableness standards.

Finally, Petitioner asserts that the human relations that create the need for privacy do not ordinarily take place in "open fields". The farmers of this country who work the ground from dawn to dusk and walk the land in their leisure certainly have as much need to be free from arbitrary and unreviewed intrusion by government power as did the owner of the commercial warehouse in **See v. City of Seattle,** 387 U.S. 541 (1966) or the electrical and plumb-

ing corporation in **Marshall v. Barlow's, Inc.**, 436 U.S. 307 (1978). The subtle influences of hindsight too easily obsecure the affront that Petitioner's unrestrained and arbitrary spying in this case could have caused to an innocent family's constitutional rights.

V.

CONCLUSION

This Court stated in **Katz v. United States**, 389 U.S. 347, 359 (1967), that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." The Florida Supreme Court's decision merely gives life to that maxim. Wherefore, **Amicus Curiae** Western Growers Association respectfully prays that the judgment below be affirmed.

Respectfully submitted,

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I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate, Riverside, California 92509.

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_____

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No. 81-1636

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF FLORIDA, PETITIONER

v.

FRANK J. BRADY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the warrantless entry by police onto a fenced and posted 1800 acre field violated the Fourth Amendment.

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4 W. Blackstone, *Commentaries* (Univ. of Chicago Press ed. 1979) 8
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1636

STATE OF FLORIDA, PETITIONER

v.

FRANK J. BRADY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE UNITED STATES

This case presents an important question under the Fourth Amendment concerning the scope of the "open fields" doctrine first enunciated in *Hester* v. *United States*, 265 U.S. 57 (1924). Although this is a state prosecution, the circumstances under which police may enter onto a field without a search warrant is a question that arises frequently in federal cases. Accordingly, the United States has a direct and significant interest in the standard applicable to such cases.

STATEMENT

1. On April 21, 1978, Florida law enforcement agents received information that an aircraft loaded with illegal drugs would be landing on an airstrip located on a cattle ranch belonging to respondent Frank Brady (Pet. App. A2; J.A. 37-38, 53-54). The airstrip was in the middle of the property, an 1800 acre field fenced with barbed wire and posted with no trespassing and no hunting signs. The only structures on the Brady property were a house trailer and some type of barn. The trailer was located approximately two thousand feet away from the end of the airstrip (J.A. 28-33). Police surveillance was set up just outside the property that night, but no planes were observed landing (Pet. App. A2-A3; J.A. 39-40, 54-55).

On April 22, the police received a more specific tip indicating that a plane would land on the Brady ranch at about dusk that evening, using a particular radio frequency to trigger the runway lights (Pet. App. A3; J.A. 40). Three surveillance teams stationed themselves on or around the Brady property. In order to position themselves near the airstrip, one team of officers entered the field by cutting a chain lock on one of the gates and another team climbed over the barbed wire fence (Pet. App. A3; J.A. 41-42, 48-50, 55). After the plane landed, the officers ascertained that bales of marijuana apparently were being unloaded (J.A. 43-44, 50-53, 56). They then converged on the plane and arrested the respondents.[1]

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[1] The officers did not at any time approach the trailer or barn (J.A. 32-33, 46, 53).

2. Respondents Brady, Eckard, and Elliot were charged with delivery and possession of marijuana in excess of 100 pounds, conspiracy to possess marijuana in excess of 100 pounds, and importation of marijuana. Respondents List and Manuel were charged with attempted possession of marijuana in excess of 100 pounds (Pet. App. A2). Prior to trial, the trial judge granted a motion to suppress the seized evidence because no search warrant had been obtained (J.A. 58-61). The Florida District Court of Appeal, Fourth District, affirmed (Pet. App. A29-A45).

The Florida Supreme Court also affirmed the suppression order (Pet. App. A1-A27). The court rejected the State's argument that, under the "open fields" doctrine of *Hester* v. *United States*, 265 U.S. 57 (1924), the warrantless entry onto Brady's land did not violate the Fourth Amendment. The court recognized that *Hester* has not been overruled, but it held that under the analysis of *Katz* v. *United States*, 389 U.S. 347 (1967), "if the owner or occupier of a field seeks to keep it private and demonstrates an actual intention to do so, *and* his expectation is one that society is willing to recognize as reasonable, then Fourth Amendment protections extend to activities in that field" (Pet. App. A9; emphasis in original). Because the property was fenced and posted, the court first concluded that respondent Brady had manifested an expectation of privacy in his field (*id.* at A13). Second, while acknowledging that activity conducted in an open field does not ordinarily warrant a significant expectation of privacy, the court held that under the facts of this case and "in light of the size of the property and the precautions taken by respondent [Brady]," an expectation of privacy was reasonable (*id.* at A17). See

also *id.* at A22-A23. Justice McDonald dissented (*id.* at A25-A27), finding that the Brady "property, although fenced, is essentially an open field" (*id.* at A26) and hence that, under the *Katz* analysis, respondents could have no reasonable expectation of privacy there.[2]

SUMMARY OF ARGUMENT

I.

A. In *Hester* v. *United States*, 265 U.S. 57, 59 (1924), this Court held that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields." This rule was not undermined by this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), which held that warrantless wiretapping of a public telephone violated an individual's legitimate expectation of privacy. To the contrary, this Court cited *Hester* with approval in *Katz* itself and has done so in subsequent decisions. This is because the *property* interest that a landowner has in his field is not equivalent to a *privacy* interest that gives rise to Fourth Amendment protection. Apart from the curtilage surrounding a residence, an individual does not have an expectation of privacy that society is prepared to recognize as "reasonable" in an open field.

---

[2] We note that although respondent Brady, the owner of the property, clearly was entitled to challenge the entry onto his own land as violative of the Fourth Amendment, there is no showing that the other four respondents had any connection with the property sufficient to support a Fourth Amendment claim. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978). Because the "standing" question has not been raised in this case, however, it appears that the merits of the Fourth Amendment claim are before the Court even though the State has dismissed the charges against Brady. See Br. in Opp. 16.

B. Posting and fencing an open field does not necessarily alter its character so as to create a protected Fourth Amendment privacy interest in the field. While posting a field puts an outsider on notice that he is about to commit a trespass, the facts of *Hester* make clear that the "open fields" doctrine is based on the lack of privacy expectation in the field and does not depend on whether or not the police officer is aware that he is trespassing. The posting of "No Trespass" signs, as a practical matter, gives a landowner little assurance that outsiders will not enter his property; indeed, state statutes typically give law enforcement officials, such as game wardens, specific authority to enter private posted lands to monitor compliance with state wildlife laws. See, *e.g.*, Fla. Stat. Ann. § 372.07(1) and (2)(a) (West 1974).

Nor does the existence of a fence surrounding an open field necessarily increase the expectation of privacy in that field. Fences around large areas of rural property are usually designed to mark a boundary or to keep animals in rather than to keep people out, and they pose little impediment to entry by a person. Like posting, the existence of such a fence does not give a landowner a reasonable assurance that outsiders will not enter onto his land. Accordingly, the courts generally have held that there is no protected Fourth Amendment privacy interest in a field that is surrounded by a nonexclusionary fence.

C. A landowner may, however, take substantial measures to exclude outsiders from his field, such as erecting a barrier designed to prevent entry by other persons. Arguably, such action would give him a reasonable expectation of some degree of privacy in the field. Even so, that expectation of privacy is a limited one that does not approach the privacy in-

terest that an individual has in his home or office. Even a field surrounded by an exclusionary fence is subject to observation from the air and thus cannot be regarded as wholly private. More important, if the police are mistaken in their suspicion of criminal activity, their unjustified entry into the field is only a minimal disruption of an individual's privacy; the officers will observe only what is ordinarily found in a field, such as cornstalks and cows. On the other hand, when police enter a home, they intrude into the area that people reserve for their most personal and private matters.

Because of the magnitude of the privacy invasion involved in a search of a home, this Court has concluded that the Fourth Amendment establishes two prerequisites to sustain the reasonableness of such a search: (1) the substantive standard for balancing societal law enforcement interests against individual privacy interests is probable cause; (2) as a procedural protection to minimize the risk of a mistake, probable cause is to be determined by a neutral and detached magistrate. In the case of an entry onto a field, where the privacy intrusion is so much smaller, it is reasonable that the prerequisites to such an entry be more relaxed, as the Court has recognized in other contexts where there is a substantially reduced privacy intrusion. For example, the warrant requirement does not apply to a search of an automobile, which is an area of reduced privacy expectation. See *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977). And police may effect brief investigatory detentions on suspicion that does not amount to probable cause. See, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1 (1968). In a situation where police have reason to suspect that evidence of criminal activity will be found in a field —even one surrounded by an exclusionary fence ar-

guably justifying recognition of some degree of privacy interest—it is "reasonable" within the meaning of the Fourth Amendment to enter the field on the basis of a reasonable suspicion of criminal activity, given the comparatively minor privacy intrusion entailed in the entry.

II.

Applying the foregoing analysis, the record indicates that the entry onto respondent Brady's field did not violate the Fourth Amendment. While the field was fenced, outsiders continually trespassed on the ranch and the police officers here climbed over the fence without apparent difficulty. Thus, the fence appears not to have been an exclusionary one, but rather an ordinary livestock fence, which the courts generally have recognized as not creating a legitimate expectation of privacy in a field. But even apart from this, the information received by the officers gave them reasonable suspicion that criminal activity was afoot on the Brady ranch, and it was therefore "reasonable" under the Fourth Amendment for them to enter to investigate their suspicion and to thwart serious criminal activity.

ARGUMENT

I. IN THE ABSENCE OF SUBSTANTIAL MEASURES TO EXCLUDE THE PUBLIC, THERE IS NO REASONABLE EXPECTATION OF PRIVACY IN A FIELD THAT INVOKES THE PROTECTION OF THE FOURTH AMENDMENT

A. The Open Fields Doctrine Retains Its Vitality Today

The "open fields" doctrine was first enunciated by this Court in *Hester* v. *United States*, 265 U.S. 57 (1924). In *Hester*, two revenue officers entered onto the defendant's property and, from a distance of 50-

100 yards from his house, saw the defendant hand another person what appeared to be a gallon jug of illicitly distilled whiskey. The Court held, in a unanimous decision authored by Justice Holmes, that the fact that the officers had trespassed on the defendant's property was not a reason for suppressing the observations made by the officers. The Court explained (265 U.S. at 59): "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."

While the Court's opinion in *Hester* is conclusory, it has become the source of a well-entrenched rule of law, *viz.*, that the open areas beyond the house and its "curtilage" are not within those areas protected by the Fourth Amendment.[3] This rule is soundly based in the specific language of the Fourth Amendment and its limited proscription of only those searches and seizures that are "unreasonable."

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[3] The curtilage is an area surrounding the house that is habitually used for family purposes. See *Black's Law Dictionary* 346 (5th ed. 1979). The common law recognized that the curtilage was to be treated as a part of the house for some purposes (see 4 W. Blackstone, *Commentaries* ch. 16, at 225 (Univ. of Chicago Press ed. 1979)), and the Court in *Hester* cited to this common law rule. 265 U.S. at 59. Accordingly, it has been recognized that the open fields doctrine does not extend to the curtilage. See, *e.g.*, *United States* v. *Van Dyke*, 643 F.2d 992, 993 (4th Cir. 1981); *United States* v. *Williams*, 581 F.2d 451, 453 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979); *United States ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292, 1295-1297 (7th Cir. 1976), cert. denied, 431 U.S. 930 (1977); *Care* v. *United States*, 231 F.2d 22, 25 (10th Cir.), cert. denied, 351 U.S. 932 (1956).

The Florida Supreme Court held that this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967), undermined the continuing viability of *Hester*. See Pet. App. A6-A7. But there is nothing in *Katz* to suggest repudiation of the open fields doctrine. In *Katz*, the Court held that the Fourth Amendment protected against warrantless wiretapping private conversations conducted in a public telephone booth. To be sure, *Katz* recognizes that the Fourth Amendment may extend to an area that is not within the curtilage of a privately-owned building, but it does so in the specific context of electronic surveillance of a phone booth; it certainly does not suggest extension of Fourth Amendment protection to an area like a field, even if an individual may prefer that his activity there remain private.[4]

Indeed, both the majority opinion in *Katz* and Justice Harlan's oft-cited concurring opinion, each of which was relied upon by the Florida Supreme Court (Pet. App. A7-A9), discuss *Hester* approvingly. Cit-

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[4] The Court in *Katz* noted that the issue involved there, because of significant scientific advances in the area of electronic surveillance and "the vital role that the public telephone has come to play in private communication," was one that could not specifically have been contemplated by the Framers or even by the Court in earlier years. See 389 U.S. at 352; *id.* at 362 (Harlan, J., concurring). No comparable technological advance provides any basis for affording a greater degree of Fourth Amendment protection to a field today than at the time *Hester* was decided or when the Fourth Amendment protection of "persons, houses, papers, and effects" was first enacted. See *United States* v. *Oliver*, No. 80-5437 (6th Cir. May 5, 1982) (en banc), petition for cert. pending, No. 82-15 (filed July 2, 1982), slip op. 4.

ing *Hester*, the Court noted in *Katz* that "[i]t appears to be common ground * * * that an open field is not [an area protected by the Fourth Amendment]." 389 U.S. at 351 n.8. Justice Harlan stated that a "telephone booth is an area where, like a home, * * * and *unlike a field* [citing *Hester*], a person has a constitutionally protected reasonable expectation of privacy." *Id.* at 360 (emphasis added). See also *id.* at 361. Moreover, since *Katz* this Court has relied on *Hester* and consistently cited it approvingly in other decisions. See *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865-866 (1974); see also *Rakas* v. *Illinois*, 439 U.S. 128, 144 n.12 (1978); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 (1977); *United States* v. *Santana*, 427 U.S. 38, 42 (1976); *Cady* v. *Dombrowski*, 413 U.S. 433, 450 (1973); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 393 n.6 (1971).

An examination of the reasoning of *Katz* also makes clear that it casts no doubt on the continuing vitality of *Hester*. *Katz* holds that the Fourth Amendment protects areas where an individual has a "justifiabl[e]" expectation of privacy. 389 U.S. at 353. As the Florida court noted (Pet. App. A8-A9), Justice Harlan's concurring opinion suggests a two-part inquiry to determine whether an area is protected by the Fourth Amendment (389 U.S. at 361): whether the individual, by his conduct, has exhibited a subjective expectation of privacy *and* whether that expectation is "one that society is prepared to recognize as 'reasonable.'" See generally *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979); *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12. The Court's holding in *Hester*, in terms of the *Katz* analysis, is simply that society does not recognize as reasonable an ex-

pectation of privacy in open fields, and nothing in *Katz* suggests that a different rule should apply. See, *e.g.*, *United States* v. *Oliver*, No. 80-5437 (6th Cir. May 5, 1982) (en banc), petition for cert. pending, No. 82-15 (filed July 2, 1982); *United States* v. *Freie*, 545 F.2d 1217, 1223 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); *Patler* v. *Slayton*, 503 F.2d 472, 478 (4th Cir. 1974); see also S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968), quoted in *United States* v. *Paul*, 614 F.2d 115, 119 (6th Cir.) (Phillips, J., concurring), cert. denied, 446 U.S. 941 (1980) (discussion of federal wiretapping statute noting that expectation of privacy "clearly unjustified" in an open field).

It is true, of course, that entry onto open fields violates the landowner's *property* rights in most instances. But *Hester* stands for the proposition that a legal property interest is not necessarily equivalent to an interest protected by the Fourth Amendment, and the Court has consistently adhered to this view. See generally *Rakas* v. *Illinois*, *supra*, 439 U.S. at 143-144 n.12. This principle was not challenged in *Katz*; on the contrary, it is *Katz* that emphasizes that the focus of the Fourth Amendment is on legitimate *privacy* interests. See 389 U.S. at 351-353. It is also undoubtedly true that an individual may have a strong subjective expectation of privacy in activity he carries on in an open field, depending on the distance of the field from areas frequented by the public. The probability that another person will observe his activity "in the middle of nowhere" is small. But an individual has an analogous expectation of privacy in activities undertaken late at night in an apparently deserted alley or forest; obviously, however, he can have no constitutional objection if a policeman stumbles upon him when he is engaged in criminal

activity. Clearly, an expectation of privacy entitled to Fourth Amendment protection cannot be grounded merely on the improbability of being observed. In sum, both before and after *Katz*, there is no basis for recognizing a legitimate expectation of privacy in an open field.[5]

B. The Open Fields Doctrine Is Not Restricted To Fields That Are Unfenced And Unposted

The Florida Supreme Court conceded (Pet. App. A23) that "[a]ctivities carried on in a truly open field, or in any area which one knowingly exposes to the public, are not subject to Fourth Amendment protections." The court, however, apparently held that an expectation of privacy protected by the Fourth Amendment necessarily attaches to any field that has been fenced or posted with "No Trespassing" signs. But, as numerous other courts have held, these common features of farmland or ranches do not transform a field into an area protected by the Fourth Amendment.

The effect of posting a field is to put an individual on notice that he is about to trespass onto private property, and a fence generally has the same effect. Clearly, a police officer who enters onto fenced and posted property has not simply committed an unin-

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[5] The conclusion that the Fourth Amendment is not violated when police trespass onto an open field does not suggest that a landowner is powerless to prevent such a trespass. As a practical matter, law enforcement officers likely will enter onto private property only if they have good reason to suspect that criminal activity is afoot. If, however, a landowner is being harassed by unjustified police entry onto his property, he can seek damages or an injunction prohibiting the police from further trespass, in accordance with remedies supplied by state law.

tentional trespass. But it is evident from *Hester* itself that the open fields doctrine does not apply only to unintentional trespasses. While the opinion in *Hester* does not specify whether the property was fenced or posted, one of the revenue officers himself testified that he supposed the officers were trespassing on Hester's property. 265 U.S. at 58. Thus, the Court found no Fourth Amendment violation in *Hester* even though the officers were aware that they were trespassing. *Hester* holds that a knowing trespass onto an open field, although perhaps violative of state law, does not violate the Fourth Amendment because such a field is not an area in which there is a legitimate expectation of privacy; the posting of "No Trespassing" signs does not alter that conclusion.

Moreover, state statutes typically permit access by law enforcement officers to private property under circumstances in which access to enclosed structures would not be allowed. For example, Florida law permits game and fish commission officials and wildlife officers to "enter upon any land or waters of the state for performance of their lawful duties * * * and such entry shall not constitute a trespass" and to "[g]o upon all premises, posted or otherwise" in order to determine whether the state game and wildlife laws are being violated, so long as they do not enter any buildings. Fla. Stat. Ann. § 372.07(1) and (2)(a) (West 1974). This specific authorization is illustrative of a more general recognition that in many situations a law enforcement officer is empowered to enter upon private property in the performance of his duties where an entry by a private party would constitute a trespass. See, *e.g.*, *United States* v. *Knight*, 451 F.2d 275, 278 (5th Cir. 1971), cert. denied, 405 U.S. 965 (1972); *United States* v. *Capps*, 435 F.2d

637, 640 & n.4 (9th Cir. 1970). Thus, a landowner who posts his field can have no reasonable expectation of complete privacy from law enforcement officers.

By the same token, the existence of a fence around rural property does not necessarily give rise to a greater expectation of privacy in a field. Ordinarily, the purpose of such a fence is to mark a boundary or to keep farm animals within the property. As one court has noted, such rural fences "are designed more to keep livestock under control than to keep people out." *State* v. *Stanton*, 490 P.2d 1274, 1279 (Or. Ct. App. 1971). See also *United States* v. *Williams*, 581 F.2d 451, 454 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979); *Giddens* v. *State*, 156 Ga. App. 258, 259, 274 S.E. 2d 595, 597 (1980), cert. denied, 450 U.S. 1026 (1981). Rural landowners recognize that hunters and other members of the public frequently enter private fields (see *State* v. *Cemper*, 209 Neb. 376, 307 N.W.2d 820, 823 (1981); *State* v. *Stanton*, *supra*, 490 P.2d at 1279), and that an ordinary likestock fence does not present much of an obstacle to entry by a person (see *Giddens* v. *State*, *supra*, 156 Ga. App. at 259, 274 S.E. 2d at 597).[6] Accordingly, while he may hope that persons will be discouraged from trespassing or inadvertently wandering onto his property, a landowner has little expectation that persons with a strong desire to enter his field will be deterred by posting the field

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[6] Indeed, in at least two of the reported cases concerning the applicability of the open fields doctrine to a fenced field, law enforcement officers entered the field after the criminal activity was reported to them by members of the public who were trespassing on the property. See *State* v. *Stanton*, *supra* (two teenagers); *State* v. *Byers*, 359 So.2d 84 (La. 1978) (hunter).

or by the presence of a livestock fence surrounding the entire property.[7]

Recognizing the inevitable limitations on the degree of privacy that reasonably can be expected in an open field, the courts of appeals, both before and after *Katz*, generally have declined to suppress evidence seized in an open field, even where the property is fenced and posted. For example, in *United States ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292 (7th Cir. 1976), cert. denied, 431 U.S. 930 (1977), the court held that a fenced goosehouse came within the ambit of the open fields doctrine because the goosehouse was beyond the curtilage and the fence was for the purpose of containing the geese. Significantly, the court dismissed out of hand the relevance of a perimeter fence, finding that most of the 20-acre farm "was clearly open fields" even though the entire farm was surrounded by a fence. *Id.* at 1297. In *United States* v. *Oliver*, *supra*, slip op. 7, the court explained that "[t]he legal principles that protect privacy * * * do not protect * * * the open field—even one the owner has posted with a 'no trespass' sign." See also *United States* v. *Williams*, *supra*; *McDowell* v. *United States*, 383 F.2d 599 (8th Cir. 1967); *Care* v. *United States*, 231 F.2d 22 (10th Cir.), cert. denied, 351 U.S. 932 (1956); *Janney* v. *United States*, 206 F.2d 601 (4th Cir. 1953); *Stark* v. *United States*, 44 F.2d 946 (8th

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[7] A fence, depending on its nature, may designate a particular area of a farm as more private, and a fence closely surrounding a residence may be an important factor in defining the curtilage. See, *e.g.*, *United States* v. *Van Dyke*, *supra*, 643 F.2d at 994; *United States* v. *Williams*, *supra*, 581 F.2d at 454. But a boundary fence that surrounds a large farm does not convert all the open areas on the farm into areas protected by the Fourth Amendment.

Cir. 1930); but see *United States* v. *Dunn*, 674 F.2d 1093, 1100 (5th Cir. 1982) (fenced-in barn held within curtilage).[8]

By the same token, several state court decisions have recognized the applicability of the open fields doctrine despite posting or the existence of a fence. See *Luman* v. *State*, 629 P.2d 1275 (Okla. 1981) (barbed wire fence); *State* v. *Cemper*, *supra* (entry though open gate in barbed wire fence); *Giddens* v. *State*, *supra* (barbed wire fence); *People* v. *Lashmett*, 71 Ill. App. 3d 429, 389 N.E. 2d 888 (1979), cert. denied, 444 U.S. 1081 (1980) (officers climbed over two fences); *Ford* v. *State*, 264 Ark. 141, 142, 569 S.W.2d 105, 106 (1978), cert. denied, 441 U.S. 947 (1979) (posted and fenced field with locked gate); *State* v. *Wren*, 115 Ariz. 257, 564 P.2d 946 (Ct. App. 1977) (barbed wire fence); *Commonwealth* v. *Janek*, 242 Pa. Super. Ct. 340, 363 A.2d 1299 (1976) (field posted and surrounded by embankments and barbed wire fences); *State* v. *Stanton*, *supra* ("a couple" of livestock fences); *Casey* v. *State*, 87 Nev. 413, 488 P.2d 546 (1971) (fenced ranch); contra, *State* v. *Byers*, 359 So.2d 84 (La. 1978) (marijuana field held not "open" because posted and road chained). These decisions rest simply on the notion that posting a field or the existence of a non-

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[8] Numerous other decisions, not involving fields described as fenced or posted, also recognize the continuing vitality of the *Hester* open fields doctrine after *Katz*. See, *e.g.*, *Patterson* v. *National Transportation Safety Board*, 638 F.2d 144 (10th Cir. 1980); *United States* v. *Ramapuram*, 632 F.2d 1149, 1155 (4th Cir. 1980), cert. denied, 450 U.S. 1030 (1981); *United States* v. *Basile*, 569 F.2d 1053 (9th Cir. 1978); *United States* v. *Freie*, *supra*; *Patler* v. *Slayton*, *supra*; *United States* v. *Brown*, 487 F.2d 208, 210 (4th Cir. 1973), cert. denied, 416 U.S. 909 (1974).

exclusionary perimeter fence does not sufficiently change the nature of a person's expectation of privacy in an open field that it is reasonable to attach a constitutionally protected privacy right to items present or activities carried on in that field.[9]

C. Even When A Landowner Takes Substantial Measures To Exclude Persons From A Field, That Field May Reasonably Be Searched Without A Warrant Or Probable Cause

The foregoing discussion is not meant to suggest that there are no circumstances in which an open field can be converted into an area subject to Fourth Amendment protections. Obviously, houses and other buildings stand on what once was an open field. When a landowner takes substantial measures to exclude the public, such as construction of an exclusionary fence, as opposed to the insubstantial livestock fence that usually surrounds a field, it is at least arguable that he has a limited expectation of privacy in the enclosed area. Thus, for example, in *United States* v. *FMC Corp.*, 428 F. Supp. 615 (W.D.N.Y. 1977), aff'd, 572 F.2d 902 (2d Cir. 1978), where the landowner surrounded a lagoon with an eight-foot high fence topped with barbed wire, the court concluded that he had a legitimate expectation of privacy in that lagoon.

The correctness of this view is debatable. Even when surrounded by an exclusionary fence, a field is

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[9] Of course, there are areas outside the home that are sufficiently private to warrant Fourth Amendment protection. Thus, the courts have invalidated searches of enclosed structures or open areas that are part of the curtilage. See, *e.g.*, *United States* v. *Van Dyke, supra; United States* v. *Holmes*, 521 F.2d 859 (5th Cir. 1975); *Wattenburg* v. *United States*, 388 F.2d 853, 857-858 (9th Cir. 1968).

still a field—and unmistakably remains not a person, house, paper, or effect. But even assuming that the fencing of a field at some point creates a constitutionally protected privacy interest that requires official intrusion to be reasonably justified, it does not follow that the field should be given the same constitutional protection as a home. That is, a search of such a field can be reasonable within the meaning of the Fourth Amendment even if not conducted pursuant to a warrant or based on probable cause. Because the privacy interest in a field, even if measures have been taken to exclude outsiders, does not approach the privacy interest in a home, a search of that field is a significantly lesser intrusion than a search of the home and correspondingly requires a lesser degree of justification.

First, even a field surrounded by an exclusionary fence is subject to observation from the air and thus cannot be regarded as wholly private.[10] Because the manner of observation is ordinarily of no consequence to the landowner, he has a limited legitimate expectation of preserving the privacy of things observable from the air. See *United States* v. *Oliver*, *supra*, slip

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[10] Aerial observation consistently has been held not to invade an expectation of privacy recognized under the Fourth Amendment. See, *e.g.*, *United States* v. *Allen*, 633 F.2d 1282, 1289-1290 (9th Cir. 1980), cert. denied, No. 80-2125 (Oct. 5, 1981); *United States* v. *Mullinex*, 508 F. Supp. 512, 514-515 (E.D. Ky. 1980); *United States* v. *DeBacker*, 493 F. Supp. 1078, 1081 (W.D. Mich. 1980); *People* v. *Lashmett*, *supra*, 71 Ill. App. 3d at 431, 389 N.E.2d at 890; *State* v. *Stachler*, 58 Hawaii 412, 418-419, 570 P.2d 1323, 1327-1328 (1977); *Dean* v. *Superior Court*, 35 Cal. App. 3d 112, 117-118, 110 Cal. Rptr. 585, 589-590 (1973); but see *People* v. *Sneed*, 32 Cal. App. 3d 535, 542-543, 108 Cal. Rptr. 146, 150-151 (1973).

op. 6 n.4. More important, the intrusion on the landowner's privacy when police enter a field is not even remotely comparable to the intrusion that is involved when police enter a home or business premises or search through private papers. In the case of a search of a private residence, if the police are mistaken in their suspicion of criminal activity, they unnecessarily disrupt the area that people reserve for their most personal and private matters. The exposure of these matters to outsiders is a most severe intrusion into the privacy of the innocent individual. In order to safeguard these important privacy interests against unjustified invasion, the Fourth Amendment interposes two requirements before a home or office can be searched: the substantive requirement that the police have probable cause to believe that evidence of criminal activity will be found and the procedural requirement that this determination be made by a neutral and detached magistrate.

If the police err in invading an open field, however, the consequences are much less severe. The entry is a minimal disruption of an individual's privacy. Exposure to the police of the contents of an open field is relatively unintrusive. In most cases, the consequence is simply that the police observe nothing but a field and perhaps some cornstalks or cows; an individual is highly unlikely to keep in an open field personal effects that he wishes to keep private. Because the invasion of privacy resulting from an erroneous search is substantially smaller in the case of a field than in the case of a residence, an office, or even an automobile, it is reasonable that the Fourth Amendment standard that must be satisfied before a search may occur be less severe.

Suppose, for instance, that the police receive an anonymous tip that the body of a missing person is

buried in the corner of a fenced wheat field or that a cache of automatic weapons is hidden in the woods inside a large, fenced farm. The tip affords a reasonable suspicion of unlawful activity but is insufficiently substantiated to provide probable cause, without which no warrant can be obtained. While the police could not rely on information of this quality to search a house, reason dictates that the information affords a sufficient basis to undertake a search implicating the comparatively inconsequential privacy interests in a field or woods. Accordingly, a rational balancing of societal and individual interests in this circumstance calls for allowing a search upon a justification that, while concrete and objectively verifiable, is less substantial than is needed to justify invasion of more private areas.

This Court has recognized in other contexts that the two basic constitutional prerequisites to a search of a residence do not necessarily apply where there is a substantially reduced privacy intrusion. For example, a search of an automobile is a significantly lesser intrusion than a search of a residence. As the Court explained in *United States* v. *Chadwick*, 433 U.S. 1, 12 (1977), quoting *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion):

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects * * *. It travels public thoroughfares where both its occupants and its contents are in plain view.

As a result, the warrant requirement is thought to be unnecessary to protect adequately the owner's privacy interests in the vehicle's interior. See also *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979);

Rakas v. *Illinois*, *supra*, 439 U.S. at 153-155 (Powell, J., concurring); *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976). Even so, it is clear that the likelihood that personal effects will be found in a car (perhaps while in transit to or from a residence)[11] is substantially greater than the likelihood that such personal effects will be found in an open field.[12]

Similarly, seizures that are a minimal intrusion compared to an arrest may be effected on less than probable cause. See, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry* v. *Ohio*, 392 U.S. 1 (1968). And in the context of administrative searches, where there is generally a reduced expectation of privacy (see *Donovan* v. *Dewey*, 452 U.S. 594, 598-599 (1981)), a search satisfies the "reasonableness" requirement of the Fourth Amendment despite absence of probable cause to believe that a violation will be found, even where a residence is involved. See *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967).

Given the extremely limited nature of the privacy intrusion involved in the search of a field, it is appropriate that such searches not be constrained by the strictest level of Fourth Amendment protection. There will be situations where the police receive in-

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[11] Even if the personal effects are stored in the automobile in a container that indicates that it contains personal effects, they may be exposed by a warrantless search. See *United States* v. *Ross*, No. 80-2209 (June 1, 1982).

[12] Reduced expectations of privacy also justify warrantless administrative searches of pervasively regulated businesses. See *Donovan* v. *Dewey*, 452 U.S. 594, 598-602 (1981); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972).

formation not amounting to probable cause that there is evidence of criminal activity in a field, such as a marijuana crop, but it would be difficult or impossible to investigate this suspicion further without entry onto the field. In light of the minimal adverse consequences that would occur from an entry if the information turns out to be erroneous, it is "reasonable" within the meaning of the Fourth Amendment, even if a field is surrounded by an exclusionary fence, to permit police to enter onto it on the basis of reasonable suspicion of criminal activity, rather than being forced to ignore the information they have received. See *United States* v. *Johnson*, 561 F.2d 832, 852-853 (D.C. Cir.) (MacKinnon, J., concurring), cert. denied, 432 U.S. 907 (1977); *United States* v. *Knight*, *supra*, 451 F.2d at 278.[13]

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[13] Several courts have suggested that certain police investigative techniques that are more in the nature of searches than seizures implicate the protections of the Fourth Amendment, yet may be conducted based on a level of suspicion less than probable cause. See *United States* v. *Beale*, 674 F.2d 1327, 1334-1335 (9th Cir. 1982), petition for rehearing pending, No. 80-1652 (dog sniff); *United States* v. *Michael*, 645 F.2d 252, 258 (5th Cir. 1981) (en banc), cert. denied, No. 81-112 (Oct. 19, 1981) (beeper installation); *United States* v. *Allen*, *supra*, 633 F.2d at 1290 (helicopter surveillance); *United States* v. *Curtis*, 562 F.2d 1153, 1156 (9th Cir. 1977) (beeper installation); *United States* v. *Johnson*, 413 F.2d 1396, 1399-1400 (5th Cir. 1969), aff'd en banc, 431 F.2d 441 (1970) (inspection of automobile vehicle identification number). As explained in our petition in *United States* v. *Knotts*, cert. granted, No. 81-1802 (June 21, 1982), it is the government's view that installation of a beeper does not implicate any protected Fourth Amendment interest. Similarly, we do not necessarily agree that the other investigative techniques listed above implicate any constitutional protection. Nevertheless, we believe those courts have utilized a sound analytic framework in acknowledging that certain classes of searches,

II. THE ENTRY ONTO RESPONDENT BRADY'S FIELD DID NOT VIOLATE THE FOURTH AMENDMENT

Under the foregoing analysis, the applicability of Fourth Amendment constraints to a search of a field (if they are applicable at all) depends upon the measures taken by the landowner to safeguard his property. For example, in *United States* v. *Oliver*, *supra*, where the landowner did not restrict in any way access on foot to his property, the fact that he posted a "No Trespassing" sign plainly did not increase his expectation of privacy in his fields to the extent that the "open fields" doctrine should no longer apply. On the other hand, in *United States* v. *FMC Corp.*, *supra*, the construction of an exclusionary fence topped with barbed wire arguably gave rise to a reasonable expectation of privacy.

The facts set forth in the record indicate that this case falls somewhere between these two extremes. On the one hand, one of the surveillance teams actually cut the lock on a gate in order to gain access to respondent's property. While this destruction of property is not in itself a Fourth Amendment violation,[14] the fact that an individual has taken measures that effectively prevent access to his field without the destruction of property is certainly probative of the de-

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although subject to the Fourth Amendment, are reasonably justified when the police possess reasonable suspicion of criminal activity short of probable cause, but would be unreasonable if conducted on a random or suspicionless basis.

[14] The fact that the destruction of property that resulted from the entry does not violate the Fourth Amendment does not leave the property owner defenseless against such conduct. Presumably, he can bring a suit for damages to recover for any unjustified damage. See *Conrad* v. *State*, 63 Wis. 2d 616, 633 n.1, 218 N.W. 2d 252, 261 n.1 (1974).

gree of privacy that he is entitled to expect. In this case, however, it was not necessary to break the lock on the gate in order to enter the ranch; another surveillance team entered simply by climbing over the fence (J.A. 50, 55). Thus, respondent had not taken measures that would prevent outsiders from entering his farm except by breaking a lock; his legitimate expectation of privacy—assuming arguendo that some could be had in farm fields—must be measured by the easiest means of access to his ranch. See *United States* v. *Oliver*, *supra*, slip op. 6 n.4.

The record states that the fence surrounding the Brady ranch was a "barbed-wire fence" (J.A. 33). That statement could describe an exclusionary fence or an ordinary perimeter livestock fence, which is typically made of barbed wire and does not present much of an obstacle to a person. See, *e.g.*, *State* v. *Stanton*, *supra*; *Giddens* v. *State*, *supra*. The record indicates that, as would be expected of a fence surrounding a cattle ranch, the fence here was of the latter character, rather than designed to exclude outsiders. First, two of the police officers entered the field by climbing over the fence, apparently without much difficulty (see J.A. 50, 55).[15] More significantly, respondent Brady himself testified that he had constant trouble with trespassers on his property—cattle rustlers, poachers, and people who stole tires and bat-

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[15] With proper equipment, of course, almost any fence can be "climbed over." A landowner who constructed a high wall to exclude outsiders would have a reasonable expectation of privacy even if police could use special ladders to scale the wall without damaging any property. But a fence that can be stepped over or easily climbed over without equipment, such as the ordinary livestock fence, cannot be considered an exclusionary fence giving rise to a legitimate expectation of privacy.

teries from vehicles on his property (R. 15-16).[16] Thus, it does not appear that respondent Brady took such measures to exclude the public from his open field as might warrant recognition of a constitutionally protected expectation of privacy in that field.

In any event, even if the fence surrounding the ranch here was sufficient to create a reasonable expectation of privacy, the police entry was justified by information that gave them reason to suspect criminal activity.[17] They received information on two occasions that one or two planes carrying contraband would be landing at a location that the police deduced was the Brady ranch, and the information was somewhat detailed, specifying the radio frequency that would be used to turn on the runway lights and the call numbers of the planes. See Pet. App. A2-A3; J.A. 34-40. The State informs us that the source of that information was wiretaps (see Pet. Br. 57)[18] and thus more reliable than an anonymous tip. While the information apparently did not specify the Brady property and thus probably fell short of probable cause, it appears to have given the police a substantial basis for suspicion, sufficient to warrant

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[16] "R." refers to the record on appeal in the Florida Fourth District Court of Appeal, No. 78-2121.

[17] It is noteworthy that the privacy intrusion here was even smaller than that which occurred in *Hester*. In *Hester*, the revenue officers entered onto the open field so as to be in position to observe activities occurring on the curtilage. Here, by contrast, the officers did not approach the residence or curtilage and could not observe anything that was not in the field itself.

[18] Because the record has not yet been lodged with this Court, we have not been able to verify this information independently.

the limited privacy intrusion of entering onto the field.[19]

CONCLUSION

The judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted.

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[19] We emphasize again that, had the suspicions entertained by the police been unfounded, their activities would have produced a quiet evening under the stars, but no likely exposure to any private effects of respondent Brady.

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